No. 88-739

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ANTHONY SKIRLICK, *et al.*,

Petitioners,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT and APPENDIX

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November 2, 1988

QUESTIONS PRESENTED

1. Does it frustrate the policy of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 *et seq.*, to grant sureties an absolute immunity under LMRDA § 502(a) simply because the union officials those sureties bonded have *not concealed* acts of intentional and flagrant "fraud or dishonesty" that have caused loss of union funds?

2. Does a consistent national labor policy require a Federal standard for "acts of fraud or dishonesty" which excludes the notoriousness of such acts as a defense to liability under LMRDA § 502(a) for union officials who commit such acts or the sureties who have bonded them?

CERTIFICATE OF COUNSEL REQUIRED BY RULE 21(b) OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT

The undersigned counsel of record for the petitioners certifies that the following listed parties appeared upon the pleadings below:

I. As plaintiffs (petitioners) herein:

Anthony Skirlick, and

John Hough.

As individuals and as representatives of a class.

II. As defendants (respondents) herein:

Professional Air Traffic Controllers Organization (PATCO);*

Robert E. Poli, as President of PATCO and individually;

Robert E. Meyer, as Executive Vice President of PATCO and individually;

Michael Fermon, as a Regional Vice President of PATCO and individually;

Gary W. Eads, as a Regional Vice President, and President of PATCO and individually;

Domenic V. Torchia, as a Regional Vice President, and Executive Vice President of PATCO and individually;

George W. Brandon, as a Regional Vice President of Patco and individually;

David Siegel, as a Regional Vice President of PATCO and individually;

* PATCO was dismissed from this action; service was never obtained on Teresa E. Green and Cecilia Kessler.

Charles Campbell, as a Regional Vice President of PATCO and individually;

William Lawrence Phillips, as a Regional Vice President of PATCO and individually;

David Trick, as Director of Labor Relations of PATCO and individually;

Dennis Reardon, as Director of Labor Relations of PATCO and individually;

David M. Duren, as Comptroller of PATCO and individually;

Teresa E. Green, as a Bookkeeper of PATCO*;

Cecilia Kessler, as a Bookkeeper of PATCO*; and

Fidelity & Deposit Company of Maryland.

/s/

Glenn H. Carlson, Esquire

Attorney of Record for Petitioners

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTRODUCTION

Anthony J. Skirlick, *et al.*, individually and as representatives of a class, hereby petition this Court for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on August 5, 1988, is reported at 852 F.2d 1376 (D.C. Cir.

1988), and appears in the Appendix hereto (A) at 1a. The opinion of the District Court for the District of Columbia, which the Court of Appeals affirmed, is reported at 659 F. Supp. 104 (D.D.C. 1987), and appears in A at 11a.

JURISDICTION

Jurisdiction over this petition obtains under Rule 20.2 of the Rules of this Court. Jurisdiction of the District Court was predicated upon 28 U.S.C. §§ 1331 and 1337 and in the Circuit Court, 28 U.S.C. § 1352 was added to the jurisdictional bases at oral argument.

STATUTES AND REGULATIONS INVOLVED

Petitioners' claims arise under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401 *et seq.*, as the provisions thereof are made applicable to Federal employees by the regulations found at 29 C.F.R. §§ 207.1 *et seq.* (1981). The relevant texts of these appear in A at 43a *et seq.*, and 46a *et seq.*, respectively.

STATEMENT OF THE CASE

This case arises from an illegal strike against the Federal Aviation Administration (FAA) instituted by the leadership of the Professional Air Traffic Controllers Organization (PATCO) and a majority of its members, not including petitioners and the class of non-striking air traffic controllers they represent. Respondent Fidelity and Deposit Company of Maryland (F&D) is the underwriter of certain fidelity bonds issued to PATCO pursuant to LMRDA § 502(a) to insure PATCO against

losses caused by its officers' "acts of fraud or dishonesty." Petitioners contend that in the course of knowingly instigating and perpetrating a strike illegal under Federal law, PATCO's officers committed "acts of fraud or dishonesty" against non-striking members of PATCO, and that that intentional breach of fiduciary duty triggered the liability of F&D to petitioners on the bond. The District Court and Court of Appeals, however, held that the acts of which complaint was made in respect to fomenting and conducting the illegal strike did not constitute "acts of fraud or dishonesty" under LMRDA § 502(a). Petitioners seek reversal of this erroneous construction of that section.

I. The Fidelity Bond. On its face, the surety bonds F&D wrote for PATCO are "fraud or dishonesty" bonds within LMRDA § 502(a):

> The Underwriter * * * agrees to indemnify the Insured * * * against any loss of funds or other property * * * through any fraudulent or dishonest acts committed by any Employees, acting alone or in collusion with others * * *.[1]

Bonds containing this language were in force when PATCO's renegade officers and members launched their illegal strike on August 3, 1981.

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[1] *Quoted in* A at 4a. The Court of Appeals suggested that petitioners are attempting to construe the bond as covering "faithful performance" of duties by PATCO officers rather than insuring against "acts of fraud or dishonesty." *See id.* at 10a. This suggestion assumes, wrongly, that the two standards are different for the purposes of this case. In fact, when Congress amended LMRDA § 502 in 1965, replacing the original "faithful discharge" language with the new term "fraud or dishonesty," then Secretary of Labor Wirtz made clear that "there is no difference between the two standards." S. REP. NO. 698, 89th Cong., 1st Sess., Supplemental Views, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3248, 3254.

II. The Illegal Strike And Its Consequences. Since at least 1947, strikes by Federal employees have been comprehensively banned.[2] The current law prohibits any person who "participates in a strike * * * against the Government of the United States" from accepting or holding Federal employment.[3] Newly hired Federal employees must execute an affidavit attesting that they will not strike against the government.[4] Since 1962, when formal collective bargaining began between the government and Federal employee unions, the latter have been required to disavow strikes.[5] Since 1969, striking has been an unfair labor practice.[6] In 1978, Congress further empowered the Federal Labor Relations Authority (FLRA) to "revoke the exclusive recognition status" of a Federal employee union that calls, participates in, or condones a strike, work stoppage, or slow-down against a Federal agency.[7] At the time PATCO's outlaw officials and members called their 1981 strike, the illegality of that action and the serious consequences it entailed both for PATCO and individual strikers were clear. In fact, they were foreseeable at least as early as June of that year when a slow-down was illegally conducted after negotiations on a new contract reached an impasse.

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[2] Labor-Management Relations Act of 1947, Act of 23 June 1947, ch. 120, § 305, 61 Stat. 136, 160. In 1955, Congress replaced § 305 with the predecessors to the current law. Act of 9 August 1955, ch. 690, 69 Stat. 624, *now* 5 U.S.C. §§ 118p-118r.

[3] 5 U.S.C. § 7311. Violation of this section is a criminal offense. 18 U.S.C. § 1918(3).

[4] 5 U.S.C. § 3333(a).

[5] Exec. Order No. 10,988, § 2, 27 Fed. Reg. 551, 552 (1962).

[6] Exec. Order No. 11,491, § 19(b)(4), 34 Fed. Reg. 17,605, 17,613 (1969). *See* 5 U.S.C. § 7301 note.

[7] 5 U.S.C. § 7120(f).

Notwithstanding the explicit and consistent Congressional and Executive policy against Federal employee strikes, PATCO has been "a repeat offender that has willfully ignored statutory proscriptions and judicial injunctions. It has shown little or no likelihood of abiding by the legal requirements of labor-management relations in the Federal sector."[8] In 1970, PATCO instigated a so-called "sick out" that resulted in "[e]xtensive disruptions of air service."[9] In 1978, PATCO threatened a nationwide air-traffic "slow-down," and was held in contempt for its actions.[10] In 1980, PATCO members engaged in a "slow-down" in Chicago.[11] Moreover, all of these actions after 1970 occurred while PATCO was subject to an injunction resulting from its 1970 "sick out,"[12] an injunction that PATCO unsuccessfully petitioned to vacate in June of 1981, immediately before its latest strike.[13]

That strike began on August 3, 1981, after PATCO and the FAA failed to reach a mutually satisfactory accord on a new collective-bargaining agreement for the air-traffic controllers PATCO represented. The govern-

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[8] PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 586 (D.C. Cir. 1982).

[9] Miller v. Bond, 641 F.2d 997, 999 (D.C. Cir. 1981). *See, e.g.*, Ogden v. Department of Transportation, 430 F.2d 660 (6th Cir. 1970); Henson v. United States, 321 F. Supp. 122 (E.D. La. 1970); Herriges v. United States, 314 F. Supp. 1352 (D. Mont. 1970); United States v. PATCO, 312 F. Supp. 189 (D. Minn. 1970); Air Transp. Ass'n v. PATCO, 313 F. Supp. 181 (E.D.N.Y. 1970).

[10] Air Transp. Ass'n v. PATCO, 453 F. Supp. 1287 (E.D.N.Y.), *aff'd mem.*, 594 F.2d 851 (2d Cir. 1978).

[11] United States v. PATCO, 653 F.2d 1134, 1136 (7th Cir. 1981).

[12] *See* Air Transp. Ass'n v. PATCO, *supra*.

[13] Air Transp. Ass'n v. PATCO, 516 F. Supp. 1108 (E.D.N.Y.), *aff'd*, 667 F.2d 316 (2d Cir. 1981).

ment quickly obtained restraining orders against the strike,[14] followed by citations for civil and criminal contempt when the orders went unheeded.[15] In addition, some 11,000 striking controllers who did not return to work were fired.[16]

The FAA immediately filed unfair labor practice charges with the FLRA. PATCO offered no testimony or other evidence to support a specific defense to the charges, to show that "it had in any way attempted to comply with the statutory ban on strikes" or that "it even attempted to end the strike," or to demonstrate "mitigating circumstances."[17] On this record, the FLRA revoked PATCO's status as exclusive representative for Federal air-traffic controllers.

Affirming the FLRA's decision, the Court of Appeals for the District of Columbia Circuit described the strike as "arguably the most serious unfair labor practice in the Federal sector since the enactment of the 1978 Civil Service Reform Act," and characterized

> PATCO's actions before and after August 3, 1981, * * * as defiant. The union threatened its strike, then wilfully and intentionally called and participated in it. After the strike commenced, PATCO made no

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[14] *E.g.*, United States v. PATCO, 524 F. Supp. 160 (D.D.C. 1981); Graham v. PATCO, 524 F. Supp. 160 (D.D.C. 1981).

[15] *E.g.*, United States v. PATCO, 107 L.R.R.M. 3210 (D.D.C. 1981); United States v. Phillips, 527 F. Supp. 1361 (N.D. Ill. E.D. 1981); United States v. Restor, 529 F. Supp. 579 (W.D. Pa. 1982).

[16] *See* PATCO v. Department of Transportation, 529 F. Supp. 614 (D. Minn. 1982).

[17] PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 553-54, 578, 587 (D.C. Cir. 1982).

> attempt to end it; indeed, PATCO condoned and encouraged it. * * * If the extreme remedy [of revocation of exclusive-representational status] cannot properly be applied in this case, we doubt that it could ever properly be invoked.[18]

Concurring, Judge MacKinnon denounced "the irresponsibility of [PATCO]" for not having some kind of "substantiation * * * *immediately available*, to defend such a monstrous attempt to paralyze the entire nation's principal means of transporting its citizens and its mail." For the strike, Judge MacKinnon explained,

> was really against the United States, and the principal victims were the citizens of the United States. Such was clearly the intention of [PATCO]. The scheme of the strike was that the convenience of the nation's 265 million citizens would be held hostage to [PATCO's] demands. * * * PATCO obviously believed that its strike would effectively bring the nation to its knees and force the government to give in to its demands. It was a flagrant attempt to misuse the exclusive control over the nation's airways that government has established to serve its citizens.[19]

This "flagrant attempt to misuse * * * exclusive control over the nation's airways" not only cost PATCO its status as exclusive representative of Federal air-traffic controllers, but also bankrupted the organization, causing the loss of millions of dollars to those members who did not strike.[20]

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[18] *Id.* at 588, 586.

[19] *Id.* at 622 (separate opinion).

[20] *Id.*

III. Petitioners' Allegations of "Acts of Fraud or Dishonesty." On behalf of themselves and a class of similarly situated air-traffic controllers who did not participate in the 1981 strike, petitioners filed suit, alleging breach by PATCO officers of their fiduciary duties under the LMRDA, and the consequent liability of F&D under the § 502(a) surety bonds.

Specifying their charges in response to an interrogatory from F&D, petitioners included in alleged "acts of fraud and dishonesty" that:

> PATCO, through [certain individuals named in the complaint], acting individually and as the board of directors of PATCO, its agents, officers, and employees, planned and executed an illegal strike against the United States. PATCO used its funds to organize the strike, to solicit the membership to participate in * * * and to execute the strike. * * * [T]he PATCO leadership made certain private representations to the membership about the consequences (or lack of consequences) of such a strike, knowing those representations to be false at the time they were made. Further union funds were utilized to pay lawyers to defend numerous strikers * * * against criminal charges arising from the strike. The total sums of monies spent on those efforts is * * * believed to be in the millions of dollars. Such actions contravened the laws of the United States and were against the terms and policies set forth in the PATCO constitution.
>
> In addition, PATCO through its board, officers, agents, and employees, improperly spent union funds to obtain political assurances that a strike would not precipitate loss of jobs.
>
> PATCO improperly established a subsistence fund which ultimately became a "strike fund." The pay-

> ments to this fund were assessed against the union membership. The fund was utilized in contravention of the laws of the United States, which fund (approximately $4.5 million) was lost to the union, as in substantial part it was awarded to the Air Transport Association ("ATA") in payment of damages owed by PATCO to ATA for the strike.[21]

Moreover, petitioners charged, certain officers of PATCO

> [d]id alter and modify, in violation of law and the PATCO constitution, the list of individuals whose votes would be counted in the "strike vote" which was taken on August 2, and August 3, 1981. On June 24, 1981, what [petitioners] viewed to be a "strike vote" was taken; in that vote an eighty (80%) percent affirmative vote was required to ratify a "strike," and said percentage was not obtained on that date. In order to obtain the eighty (80%) percent figure in the August 2-3 vote, the officers and directors of PATCO * * * intentionally failed to count, and did knowingly reject from the tally, the votes of those PATCO members who were, *inter alia*, (i) near retirement, (ii) were in training, (iii) were on sick leave, or (iv) were disabled. And that, said acts were dishonest and fraudulent.
>
> Further, following the strike of August 3, 1981, [officers of PATCO] instituted or caused to be instituted litigations against certain of PATCO's members to force them to pay PATCO dues and fees, and that such claims were, under the circumstances, * * * fraudulently and dishonestly made.[22]

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[21] A at 40a-41a.

[22] A at 37a-41a.

Notwithstanding these allegations, the District Court granted summary judgment for F&D, on the ground that a fidelity bond insuring against "acts of fraud or dishonesty" does not cover what PATCO's officials did in this case.[23]

IV. The Court of Appeals' Opinion. The Court of Appeals affirmed the District Court's entry of summary judgment. In determining the meaning of the term "acts of fraud or dishonesty" under LMRDA § 502(a), the Court of Appeals first adopted the working-principle that "'[t]here is no Federal legislative standard for bonds "executed under any law of the United States" so we look to state law bond provisions and construction for guidance.'"[24] But then, having concluded that the "similar standards of interpretation and construction of insurance contracts" of the District of Columbia or of Maryland applied to the F&D bond,[25] and having acknowledged the Department of Labor's regulation that:

> [a]s usually applied under state laws, the term "fraud or dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss[,][26]

the court eschewed reliance on the law of the District of Columbia or Maryland, and instead *created its own*,

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[23] A at 15a-19a. This was one of several grounds on which the District Court ruled in favor of F&D, but the sole one reached by the Court of Appeals' affirmance. A at 2a-3a & n.2.

[24] A at 3a.

[25] *Id.*

[26] A at 9a, 55a.

eclectic Federal common-law standard out of whole cloth from such diverse secondary authorities as *Couch on Insurance*, AMERICAN JURISPRUDENCE 2D, and Appleman's *Insurance Law and Practice*,[27] with no reference to Maryland or District statute or case law.

Under this *new* standard, opined the Court of Appeals:

> the words "fraud" and "dishonesty" in the context of a fidelity bond * * * refe[r] to acts which "show a breach of trust or of financial integrity, *coupled with* deceit and concealment exercised in a position of trust and confidence and causing financial loss." The actions of PATCO officials in appropriating funds for the 1981 strike, which was supported by most of the union membership, do not reflect a corrupt intent to deceive or defraud the membership; nor do they reveal a breach of financial integrity, as would be the case if larceny, theft, or embezzlement of PATCO funds was involved. Therefore, the bond does not protect PATCO against the kind of conduct of which [petitioners] complain.[28]

Petitioners now seek this Court's disapproval of the essentially absolute immunity the Court of Appeals has thus given to sureties under LMRDA § 502(a) where bonded union officials *openly* engage in "acts of fraud or dishonesty" that result in serious financial losses to honest union members.

REASONS FOR GRANTING THE WRIT

I. A requirement that actionable "fraud or dishonesty" under LMRDA § 502(a) must involve concealment eviscerates the deterrent-effect of that section in pre-

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[27] A at 6a, 9a-10a.

[28] A at 6a.

cisely the most egregious cases of betrayal of trust by bonded union officers.

The import of the Circuit Court's opinion upon the enforcement of LMRDA § 502(a) is sweeping and serious: The decision wholly *removes* from the ambit of bond coverage under that section all *open and notorious* "acts of fraud and dishonesty" by labor leaders for both Federal-employee and private-sector unions. Thus, all law-abiding union members are deprived of any right to reimbursement under their unions' LMRDA bonds for the most egregiously wrongful misapplications of union funds. Such a construction of LMRDA § 502(a) flies in the face of the Congressional statutory intent to protect individual union members from bonded union officials' spending union monies for non-union—indeed, notoriously illegal—purposes.[29] The decision thus vitiates LMRDA § 502(a) by immunizing and thereby encouraging, if not rewarding, open and notorious misappropriations of union funds.

II. That a majority of the membership of a union may condone "acts of fraud or dishonesty" on the part of union officials bonded under LMRDA § 502(a) does not absolve those officials, or the sureties who bonded them, from liability for those acts.

The District Court erroneously attached significance to the acquiescence by the "vast majority of the [PATCO] union membership" in the illegal strike.[30] By grounding its decision in the open nature of the alleged violative

[29] LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, United States Government Printing Office, (Washington, 1959) (Legislative History), pp. 398, 408-12; *and see*, pp. 260 *et seq.*

[30] A at 19a.

acts, so too, did the Circuit Court. [31] But even a vote, unless it were unanimous and untainted by fraud, which it was not here, could not validly authorize the expenditure of union funds for illegal purposes. Here, the PATCO strike vote was itself illegal. 5 U.S.C. § 7116(b)(7). Thus, the "openness" and condonation of the strike are of no consequence.

These propositions receive support from the two related *Cohen* cases.[32] There it was held, *inter alia*, that payment of attorneys' fees could *not* be authorized by a less-than-unanimous vote of the union membership, where the fees were for the criminal defense of union leaders.[33] Many other cases in accord could be cited; but the principle should be self-evident: It is beyond the power of a mere majority of union members to authorize *ultra vires* expenditures by their union or its officers.

III. Whether the handling of union funds by PATCO officers constitutes "acts of fraud or dishonesty" which bring those acts within LMRDA § 502(a) is a mixed question of fact and law which must take into account the "dut[ies]" of union officials and the "special problems and functions of a labor organization" under LMRDA § 501(a).

Not only have courts consistently held that the terms "fraud" and "dishonesty" must be given a broad interpre-

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[31] A at 6a & n.5.

[32] Highway Truck Drivers and Helpers, Local 107 v. Cohen, 182 F. Supp. 608 (E.D. Pa. 1960), *aff'd*, 284 F.2d 162 (3d Cir. 1961), *cert. denied*, 365 U.S. 833 (1961) ("*Cohen I*"); Highway Truck Drivers and Helpers, Local 107 v. Cohen, 215 F. Supp. 938 (E.D. Pa. 1963), 334 F.2d 378 (3d Cir. 1964), *cert. denied*, 379 U.S. 921 (1964) ("*Cohen II*").

[33] *Cohen I* at 620

tation in the context of fidelity bonds, they have held that whether specific acts alleged constitute fraud or dishonesty is a question for the jury.[34] As the court in *Home Indemnity Company v. Reynolds & Co.* stated:

> * * * If reasonable men can differ whether the acts were dishonest, within the wide scope of that word, the question is one fact for the jury. *London & Lancashire Indemnity Co. of America* v. *Peoples Nat. Bank & Trust Co.*, 59 F.2d 149 (C.A. 7); *Irvin Jacobs & Co.* v. *Fidelity Deposit Co. of Maryland*, 202 F.2d 794 (C.A. 7); *Mortgage Corp. of N.J.* v. *Aetna Casualty & Surety Co.*, 19 N.J. 30, 115 A.2d 43. The evidence favorable to Reynolds [defendant-appellee] brings this case within the authority of these decisions. As an employer Reynolds had the right to expect that its employees would perform their work with honesty and fidelity. It paid insurance premiums to protect itself against loss caused by the lack of these qualities. The acts of the salesmen were detrimental to the firm, disregarded its best interests and subjected it to heavy losses. Since the acts complained of could be held to be both criminal and dishonest, the court on this phase of the case, properly refused to direct a verdict.[35]

Similarly, here, the non-striking PATCO membership had the right to expect that its officers would perform their jobs with honesty and fidelity, particularly in light of LMRDA. It paid insurance premiums to protect itself against losses resulting from a lack of these qualities. The acts of the officers were detrimental to the union (particularly to the non-striking members), demonstrated

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[34] *See* below, pp. 21-22.

[35] 38 Ill. App. 2d 358, 187 N.E.2d 274, 282 (1962).

a disregard for the best interests of the union, and subjected it to heavy, irreparable losses. Additionally, the acts complained of supported the charge of criminal contempt.[36]

Moreover, as the court in *London & Lancashire Indemnity Co.* v. *Peoples National Bank & Trust Co.* pointed out, a dishonest act under a fidelity bond need not involve criminal liability. Rather,

> [i]f it [the bonded individual's conduct] indicates a reckless, willful and wanton disregard for the interest of the employer—if it be an act manifestly unfair to the employer and palpably subjects him to likelihood of loss, a fact question of liability for loss thereby ensuing, as from a dishonest act, is fairly raised.
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> With this positive knowledge on Maple's [the bonded individual's] part that Bolinger and his bank were wholly unworthy of credit for any amount whatsoever, in our judgment the evidence fairly raised a jury question as to whether Maple had acted honestly toward his bank in consenting, directly or indirectly, to this further credit to Bolinger or his bank.[37]

The positive knowledge on the part of the PATCO officers that it was against the law and violative of their sworn oaths to strike against the United States government, and their knowledge of the inevitable consequences arising therefrom (*i.e.*, criminal penalties, decertification, bankruptcy) fairly raises a factual question as to whether

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[36] *See, e.g.*, United States v. Haggerty, 528 F. Supp. 1286 (D. Colo. 1981).

[37] 59 F.2d at 152.

these officers acted "dishonestly" with respect to the union. Again, it is the *characterization* of the bonded union leaders' conduct that raises a question of fact.[38] Thus, this matter was not ripe for summary judgment: A factual issue for trial exists.

This conclusion receives further support from cases in the District of Columbia which have held that the phrase "fraud or dishonesty" as contained within fidelity bonds contemplates a compelling sense of conscious wrong, and not merely a negligent act or omission, on the part of the bonded individual.[39] Each PATCO member, upon commencement of his employment by the FAA, executed a sworn affidavit, stating that he is not participating in, nor will he in the future participate in a strike against the United States. Moreover, each member was charged with the knowledge that 5 U.S.C. § 7116(b)(7) made and makes it illegal, in fact criminal, for employees of the Federal government to strike. In addition, the PATCO strikers were given a seventy-two (72) hour grace period within which to rectify their illegal activity.[40] Thus, there can be no serious contention that the strikers, including the bonded individuals, lacked the requisite conscious awareness of the wrong in which they were participating. Neither can there be any serious contention that the bonded officials lacked such awareness in authorizing the expenditures of monies in contemplation of and in connection with this illegal activity. That they acted fraudu-

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[38] *See* Rock Island Bank v. Aetna Casualty and Surety Co., 706 F.2d 219 (7th Cir. 1983).

[39] Imperial Insurance, Inc. v. Employers' Liability Assurance Corp., 143 U.S. App. D.C. 173, 442 F.2d 1197 (1970); Sade v. National Surety Corp., 203 F. Supp. 680 (D.D.C. 1962), *aff'd*, 314 F.2d 286 (1963).

[40] A at 11a, n.1.

lently and dishonestly as that phrase is used in LMRDA § 502(a) and in the bonds issued thereunder, if not apparent on the face of their behavior, at least requires a factual determination. Summary judgment here was inappropriate.

IV. Although claiming that LMRDA § 502(a) adopts standards of state law for determining what "acts" constitute "fraud or dishonesty," the Court of Appeals failed to apply the concededly controlling law of Maryland or the District of Columbia, under which the lack of concealment of such acts is no defense.

Not only did the Circuit Court fail to address the need for a factual determination under District of Columbia law, it neglected District of Columbia law on what types of acts fall within the scope of the words "fraud" and "dishonesty." Yet, supposedly, state law is to govern.

The regulations issued by the United States Department of Labor (DOL) include within the list of the types of behavior that constitute fraud or dishonesty the concept "misappropriation."[41] It is without cavil that the term "misappropriation" has been held to mean, within the context of the Uniform Fiduciaries Act of the District of Columbia, D.C. Code §§ 21-1701 *et seq.*, "wrong appropriation, or the use of a fund to a different purpose from that for which it was created; but not necessarily a dishonest purpose."[42] In reaching this definition the *Colby* court cited with approval the language of *Union Bank & Trust Co.* v. *Girard Trust Co.*, that "actual

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[41] A at 9a, 55a.

[42] Colby v. Riggs National Bank, 67 U.S. App. D.C. 259, 270, 92 F.2d 183, 194 (1937).

knowledge of breach of . . . [one's] obligation as fiduciary" is tantamount to "misappropriation."[43] These definitions were followed in *Blankenship* v. *Boyle* (interpreting other aspects of LMRDA in establishing a bank's liability where large amounts of cash were left in non-interest bearing accounts in violation of the fiduciary duties of a labor organization's welfare fund trustee).[44]

"Conversion," another concept listed by DOL, has been defined by the District of Columbia courts. In *Smith* v. *Whitehead*, the court held that:

> 'The conversion is complete when the defendant takes, detains or disposes of the chattel.' *DeKine* v. *District of Columbia*, D.C. App., 422 A.2d 981, 986 (1980) (quoting W. Prosser, *supra* section 15, at 97) (emphasis added). Prosser states, 'Perhaps the most common way in which conversion is committed is by an unauthorized transfer or disposal of the goods to one who is not entitled to them.' W. Prosser, *supra* section 15, at 87. It is not a necessary element of the tort that the convertor benefit from his act. *Harrell* v. *Anderson*, 294 F. Supp. 405, 407 (S.D. Ga. 1968); W. Prosser, *supra* section 15 at 84 n.16; 89 C.J.S. *Trover and Conversion* section 3 (1955); *cf. Pan American Petroleum Corp.* v. *Long*, 340 F.2d 211, 220 (5th Cir. 1964), *cert. denied*, 381 U.S. 926 (1965) ('The convertor may either have actual *or constructive-possession* of the property.') (Emphasis added; footnote omitted.)
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> * * *
>
> 'The essence of conversion is an interference with another's property that is so substantial as to justify

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[43] 307 Pa. 488, 161 A. 865, 867 (1932).

[44] 329 F. Supp. 1089, 1103 (D.D.C. 1971), *aff'd*, 167 U.S. App. D.C. 209, 511 F.2d 447 (1975).

> treatment as a forced sale of the property.' *Horne* v. *Francis I. DuPont & Co.*, 428 F. Supp. 1271, 1275 (D.D.C. 1977).[45]

D.C. Code § 45-1949 speaks, also, of conversion of trust monies in the context of real estate transactions and allows for recovery of monies so converted from a guarantee fund established to protect the public, much as an LMRDA fidelity bond protects the union members from conversion. PATCO officers and leaders, those persons bonded, wrongfully converted and misappropriated union funds to the strike.

Further, "[t]he words 'fraud' and 'dishonesty' as used in [any] fidelity bond include any act showing a want of integrity or a breach of trust." *First National Bank of Southern Maryland* v. *United States Fidelity and Guaranty Co.*[46]

In conducting an illegal strike, and then refusing to obey court orders directing them back to work, the individually named defendants, who were bonded by F&D, willfully disregarded PATCO's interests. These union officers knowingly violated 5 U.S.C. § 7116(b)(7) which prohibits strikes by Federal employees and, thus, triggered against their own union § 7120(f) of the statute, which calls for the decertification of labor organizations that conduct illegal strikes. Additionally, these officers spent union funds in furtherance of such illegal conduct.

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[45] 436 A.2d 339, 351 (D.C. 1982). *And see*, National Savings and Trust Co. v. Rosendorf, 182 U.S. App. D.C. 216, 559 F.2d 837 (D.C. Cir. 1977); and R.A. Weaver & Associates, Inc. v. Haas & Haynie Corporation, 213 U.S.App. D.C. 404, 663 F.2d 168, 173 (1980).

[46] 275 Md. 400, 412, 340 A.2d 275, 284 (1975). The Court of Appeals sanctioned the use of Maryland law as that law and the law of the District of Columbia are "similar." A at 3a-4a.

In doing so, they subjected the union to a significant likelihood of loss: In light of both the strike prohibition and decertification provision, it was practically a foregone conclusion that the strikers would be fired and the union decertified. Thus, the monies spent in furtherance of the strike would never be recouped; this the PATCO bankruptcy confirmed and the LMRDA bond was purchased to avoid.

That the strike itself was conducted in brazen violation of a Federal statute must be considered when determining whether such activity may be characterized as fraudulent or dishonest. In contrast to its head-in-the-sand attitude in this case, the Circuit Court has recognized elsewhere that "a failure on the part of [the bonded employee] to comply with the requirements of [D.C. Code § 35-103] could well be considered by the jury in determining whether or not he engaged in fraudulent or dishonest conduct. . . ."[47] Significant with regard to the question of fraud or dishonesty in the instant case is that the strike was an intentional, willful, and undisputable violation of Federal law, a flagrantly illegal activity conducted by the defendant officers with a "compelling sense of conscious wrong."[48] Additionally "relevant to the charge [of fraud or dishonesty] against . . . [the bonded employee] is the fact that an *unsuccessful* attempt was made to initiate prosecution against him [the bonded employee] by the United States Attorney's Office."[49] Therefore, compellingly material to the issue of "fraud or

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[47] Imperial Insurance, Inc., *supra*, 442 F.2d at 1203.

[48] Sade, *supra*, 203 F. Supp. at 684; *see also*, First National Bank of Southern Maryland v. United States Fidelity and Guaranty Co., *supra*.

[49] Sade, *supra*, 203 F. Supp. at 684; emphasis supplied.

dishonesty" here is that many of the defendants were actually found to be in criminal contempt as a result of participation in the illegal strike.

Also instructive as to the local law the Circuit Court held to be controlling—but refused to follow—on the scope of "fraud or dishonesty" is D.C. Code § 14-305(b)(1). This statute allows impeachment of a witness by showing a prior conviction of a criminal offense for which the punishment is in excess of one year or which crime "involved dishonesty or false statement." Herein the strikers violated 18 U.S.C. § 1918, which allows imprisonment for one year and a day. More importantly, the District of Columbia statute became the model for Federal Rule of Evidence 609. The Conference Report on that Rule discussed "dishonesty or false statement":

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.[50]

Violation of 18 U.S.C. § 1918 by government employees carries a second implication. Each air-traffic controller, upon employment by the FAA was and to this day is still required to execute an affidavit in which he swears to uphold the Constitution of the United States and not to strike against the United States or any of its agencies.

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[50] Conference Report, Joint Explanatory Statement of the Committee of Conference, 93d Cong., 2d Sess., *reprinted in* 28 U.S.C.S., Federal Rules of Evidence, p. 227; *and compare* 29 C.F.R. § 453.12.

Thus, by striking, the majority of PATCO's members not only violated 18 U.S.C. § 1918 but also abjured their affidavits of appointment. This is "dishonesty" plain and simple, and would be recognized as such in any other context.[51] A conviction under 18 U.S.C. § 1918 would, therefore, be a crime acceptable for use in impeachment under either D.C. Code § 14-305(b)(1)(A) or (B).[52]

V. Although explicitly denying that LMRDA § 502(a) embodies a Federal standard for bonds relating to "acts of fraud or dishonesty," the Court of Appeals jury-rigged just such a standard—albeit an erroneous and unworkable one—from general "hornbook" authorities.

Against this background of District of Columbia and Maryland law on the issue of what constitutes "acts of fraud or dishonesty," the Circuit Court's opinion is perversely paradoxical. On the one hand, the Court ruled that no general Federal standard of "fraud or dishonesty" applies to LMRDA § 502(a) bonds and that "either Maryland or the District of Columbia law governs construction of the bond" involved here.[53] Yet, on the other hand, rather than applying, attempting to apply, or even attempting to ascertain the controlling

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[51] It is not unlike the debtor who has been determined to have an obligation to a creditor and after that determination transfers his assets to the detriment of his creditor. Without the pre-existing obligation the transfer would not be dishonest; the pre-existing obligation condemns such a transfer as fraudulent or dishonest, renders it voidable. D.C. Code § 28-3101; *In re* Estate of Wall, 142 U.S. App. D.C. 187, 440 F.2d 215 (1971). Here the pre-existing affidavit renders the later act of striking dishonest—the strikers did not keep their word, their sworn word.

[52] *And see*, United States v. Haggerty, *supra*.

[53] A at 3a-4a.

Maryland or District of Columbia law, the court created its own idiosyncratic "Federal" standard out of the whole cloth of certain secondary "hornbook" authorities.

The Circuit Court's actual approach here simply belied the course of analysis it held was required: Having determined that "there apparently is no decision *by the District of Columbia Court of Appeals* in which the meaning of 'fraud' and 'dishonesty' in the context of a fidelity bond is discussed,"[54] the court then eschewed all consideration of *other* relevant District of Columbia or Maryland authorities, which the foregoing discussion shows are substantial, and turned to secondary sources. These sources were *not*, however, secondary sources of *District of Columbia* or *Maryland* law; rather, they were secondary sources of some species of "general" or "consensus" law on the meaning of "fraud" or "dishonesty." This, perhaps, is a proper form of analysis where a determination of *Federal common law* is involved; but such a determination the court explicitly held to be out of bounds.[55] Thus, the court's opinion is analytically incoherent, violates what the court itself held was the choice-of-law rule applicable here, and creates (in this case) a precedent that promises to inject disarray into the jurisprudence of LMRDA § 502(a), not only in the District of Columbia Circuit, but also in any other jurisdiction in which there may be some arguable lacuna in the local law as to "acts of fraud or dishonesty."

Simply stated, if local law controls the definition of "acts of fraud or dishonesty" under LMRDA § 502(a), then local law should be ascertained and applied as

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[54] A at 6a (emphasis added).

[55] A at 3a.

rigorously as possible, and recourse to secondary, "horn-book" sources should be strictly limited to aspects of the definitional issues that *cannot* be addressed by reference to local statutes, regulations, and case law. The inferior Federal courts cannot be licensed to invent a new body of Federal common law under LMRDA § 502(a), as the Circuit Court has done here *sotto voce*, without: first, frustrating the will of Congress, which determined that local law should control the substantive issue of what constitutes "acts of fraud or dishonesty"; and, second, creating the potential for chaos in the administration of § 502(a) as new Federal common law principles begin to emerge, pretending to reflect but in fact supplanting *sub silentio* the standards of local law.

VI. The aberrant decision of the Court of Appeals demonstrates that the goal of the LMRDA to require union officials to "adhere to the *highest* standards of responsibility and ethical conduct in administering the affairs of their organizations" cannot be achieved on a national basis under LMRDA § 502(a) without recognition of a uniform Federal policy for construing "acts of fraud or dishonesty" under local law that presumptively disallows nonconcealment of such acts as a defense for union officials or the sureties who bond them.

The Circuit Court's approach in this case does point up a serious problem in the administration of LMRDA § 502(a) that cannot be resolved by mechanical reliance on the local law of "fraud or dishonesty" as those terms relate to fidelity bonds. Clearly, in this case, District of Columbia and Maryland law do provide rather direct guidance in construing those words, contrary to the Circuit Court's view. Still, even assuming *arguendo* that the

Circuit Court correctly found *no* applicable local law on the subject, the result it reached on the basis of its reading of selected secondary sources should be rejected, because that result palpably conflicts with the fundamental purpose of LMRDA §§ 501 and 502: namely, to require union officials to "adhere to the *highest* standards of responsibility and ethical conduct in administering the affairs of their organizations."[56]

Where the local law is *completely* silent on the definition of "fraud" or "dishonesty" (as the Circuit Court, albeit wrongly, held the law was here), a decision as to what that law *ought* to hold (which, after all, is the exercise the Circuit Court purported to perform) must *ex necessitate* consult some overarching standard that subserves the goals of the LMRDA. Given a choice of possible standards to apply to the bonding of *union* officials, a court should be constrained to adopt "the *highest* standards of responsibility and ethical conduct" consistent with the extant body of local law. That is, where local law must be "found," the court must look in the right place. It must look *up*—in the direction indicated by Congress, not down to some lowest common denominator of responsibility and ethical conduct.

Petitioners submit that this analytical approach itself constitutes a *Federal* standard, at least as to the technique for construction of "acts of fraud or dishonesty" under LMRDA § 502(a) that this Court should hold is required by the LMRDA taken as a whole. For the aberrant result the Circuit Court reached in this case, and which other courts could reach under imaginative interpretations of local laws that were supposedly silent

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[56] A at 4a.

on the meaning of "fraud" or "dishonesty," eviscerates the very protections that LMRDA § 502(a) was enacted to provide to unions and their members. If, as did the Circuit Court here, courts can immunize the acts of union officials, and absolve bonding companies from their liabilities, because those acts—no matter how illegal—are open, notorious, and supposedly condoned by a majority of the unions' members, then § 502(a) will be emasculated in precisely those situations where it should be strongest. Thus, the *more* irresponsible the acts of union officials, the *lower* their standards of ethical conduct, the *greater* their defiance of the law—in all, the *worse* they behave, the *less* their liability or the liability of the parties that bond them. The union officials *least* qualified to be bonded will become the *best* risks for bonding companies, because the very likelihood of outrageously fraudulent or dishonest conduct on the part of those officials will increase the probability that the bondsmen will be held immune from liability on the fidelity bonds they issue. Rather than generating a deterrent to irresponsible conduct by union officials, the bonding process will create positive incentives for such conduct, and positive incentives for bonding companies to "look the other way," secure in the knowledge that their own liability will be *inversely* proportional to their own irresponsibility in bonding the most notorious scofflaws.

In enacting LMRDA § 502(a) and incorporating therein local law standards of "acts of fraud or dishonesty," Congress surely did *not* intend to license courts, under the guise of "interpreting" unsettled local law, to fashion unnecessary qualifications, limitations, and other impediments to the enforcement of "the *highest* standards of

responsibility and ethical conduct" possibly applicable under local law. To the contrary, Congress' intent was to make union officials, in each jurisdiction, conform to *the most exacting* ethical standards reasonably applicable under the law of that jurisdiction. In this case, the Circuit Court faced no *requirement* in the law of the District of Columbia or Maryland to limit liability on LMRDA § 502(a) bonds to "acts of fraud or dishonesty" that were committed in secret. Even if the local law did not absolutely preclude a construction of "acts of fraud or dishonesty" that are committed in secret, local law did not mandate, or even encourage, such a construction. Nothing prevented the Circuit Court from finding that the notorious nature of the "acts" did not negate their character as "fraudulent or dishonest." That being so, the Court should have been constrained by the unmistakable Congressional policy embodied in the entire LMRDA to adopt a construction that imposed on the defendants in this case the *maximum* ethical constraints compatible with the extant local law.

In sum, this Court should fashion a strong Federal presumption under LMRDA § 502(a) that local law *disallows* as a defense to the enforcement of fidelity bonds, the open and notorious nature of certain acts of fraud and dishonesty.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the U.S. Court of Appeals for the District of Columbia Circuit

August 5, 1988

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 17, 1988 Decided August 5, 1988

No. 87-7154

ANTHONY SKIRLICK, as an Individual and as a Representative of a Class, *et al.*, APPELLANTS

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLEE

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 84-02371)

Glen H. Carlson for appellants.

Mitchell H. Stabbe for appellee.

Gary W. Eads, *Domenic V. Torchia* and *Dennis M. Reardon* respectively entered appearances *pro se*.

Before ROBINSON and DOUGLAS H. GINSBURG, *Circuit Judges*, and KAUFMAN, * *Senior District Judge*.

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* Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

[2] Opinion for the Court filed by *Senior District Judge* KAUFMAN.

KAUFMAN, *Senior United States District Judge*: Appellants are former air traffic controllers who seek damages allegedly sustained as a result of the 1981 strike by members of the Professional Air Traffic Controllers Organization (PATCO).[1] Appellee is the Fidelity & Deposit Company of Maryland (F & D), the underwriter of a fidelity bond issued to PATCO to insure the union against losses caused by fraudulent or dishonest acts of its officers. Appellants essentially contend that the PATCO officers who organized and directed the strike violated their fiduciary duty to the union members, and that that breach of duty entitles appellants to prevail against F & D. In granting summary judgments to F & D, the district court concluded that appellants did not meet two conditions precedent specified in the bond: (1) appellants did not file a proof of loss within four months of the discovery of the loss, and (2) appellants failed to initiate this case within one year of the discovery of the loss. The district court also ruled that the fidelity bond did not cover the actions of the PATCO officials.[2] Since

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[1] The strike commenced on August 3, 1981 after PATCO and the Federal Aviation Administration failed to agree with regard to a new collective bargaining agreement. At that time, over seventy percent of the federally employed air traffic controllers walked off the job. After the strikers refused to obey a court order to return to work, President Reagan fired approximately 11,500 PATCO members who remained on the picket lines as of August 5, 1981. The appellants did not participate in the strike.

[2] F & D also moved for summary judgment on two additional grounds which the district court did not reach: (1) appellants lacked standing to sue on the bond and (2) appellants' prior knowledge of PATCO strike procedures and prior strikes barred any claim on the bond. The parties do not raise either issue in this appeal. Indeed, the only issue stated in this appeal is the liability of F & D.

we agree with the district court regard-[3]ing bond coverage, we reach only that issue in this appeal.[3]

I.

"There is no federal legislative standard for bonds 'executed under any law of the United States' so we look to state law bond provisions and construction for guidance." *United States ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc.*, 542 F.2d 262, 267 (5th Cir. 1976), *cert. denied*, 434 U.S. 828 (1977) (quoting 28 U.S.C. § 1352). The parties agreed at oral argument that (1) PATCO is an unincorporated association governed by the laws of the District of Columbia and (2) the bond in question was executed in Baltimore, Maryland and was delivered to PATCO in Washington, D.C. Thus, either Maryland or District of Columbia law governs construction of the bond. *See Fowler v. A & A Co.*, 262 A.2d 344, 348 (D.C. 1970). Because both jurisdictions apply similar standards of interpretation and construction of insurance contracts, we need not determine which law

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[3] Appellants initially asserted subject matter jurisdiction under 28 U.S.C. § 1331. However, appellants have since invoked jurisdiction granted in 28 U.S.C. § 1352, which provides:

> The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

PATCO, as a labor organization, was required by 29 U.S.C. § 502(a) to obtain the fidelity bond at issue in this case.

Because subject matter jurisdiction exists under 28 U.S.C. § 1352, we need not reach the question of whether jurisdiction also is present pursuant to 28 U.S.C. §§ 1331 or 1337 and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq. See Gully v. First National Bank*, 229 U.S. 109 (1936) (re the "arising under" requirement).

applies. *Compare Watson v. U.S.F. & G. Co.*, 231 Md. 266, 271, 189 A.2d 625, 627 (1962); *Govern-*[4]*ment Employees Ins. Co. v. DeJames*, 256 Md. 717, 720, 261 A.2d 747, 749 (1970) *with American Ins. Co. v. Tutt*, 314 A.2d 481, 485 (D.C. 1974); *Dryer v. Liberty Mut. Ins. Co.*, 248 A.2d 504, 505 (D.C. 1968).

II.

Congress enacted the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, in 1959 to ensure, *inter alia*, "that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations." 29 U.S.C. § 401(a). Union officials "occupy positions of trust in relation to [the union] and its members as a group. It is therefore, the duty of each such person . . . to hold [the union's] money and property solely for the benefit of the [union] and its members." 29 U.S.C. § 501(a). Congress has provided that each official who handles money of a union with "property and annual financial receipts" of more than $5,000 in value "shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others." 29 U.S.C. § 502(a).

The surety bond written by F & D for PATCO provides, in relevant part:

> The Underwriter . . . agrees to indemnify the Insured . . . against any *loss of funds* or other property . . . through any *fraudulent or dishonest acts committed by any Employees*, acting alone or in collusion with others . . . .

J.A. 251, 257, 278, 281 (emphasis added).

Appellants have not specifically identified which of two surety bonds written by F & D for PATCO is sued upon in this case. Bond number 596-06-43-A became effective on September 22, 1977 and was cancelled and replaced on September 22, 1981 by Bond number 596-06-43-B. [5] PATCO went on strike on August 3, 1981; presumably preparations for the strike occurred prior to that date. In any case, both bonds contain the same language regarding coverage for fraudulent and dishonest acts, and differ only with regard to indemnification amounts and names of union officers insured. Those differences are not relevant in this appeal.[4]

But what is most relevant is that riders attached to each bond, as issued, specifically deleted faithful performance coverage and substituted fraud and dishonesty language, J.A. 257, 281, and that PATCO was aware that it was not purchasing faithful performance coverage. *See* J.A. 285-87.

Appellants contend that the words "fraudulent and dishonest acts" should be broadly read so as to include the actions of PATCO's officers in planning and executing the 1981 strike, which led to the firing of all striking PATCO members and the decertification and bankruptcy of PATCO. In support of that contention, appellants assert that PATCO's officers knowingly violated 5 U.S.C. § 7116(b)(7), which prohibits certain strikes by federal employees, disobeyed a court order directing the strikers to return to work, and caused union funds to be expended in support of an illegal action. Appellants also claim

[4] However, it would appear that the earlier issued bond, 596-06-43-A, is the one in issue in this case.

that some of the individual officers engaged in vote fraud in an effort to assure that enough PATCO members voted to authorize the strike.

III.

An insurance policy, as a contract between the insurer and insured, *Anderson v. Group Hospitalization, Inc.*, 203 A.2d 421, 423 (D.C. 1964), is to be construed to reflect "the understanding of the ordinary person, that is to say . . . the meaning that common speech imparts." [6] *American Ins. Co. v. Tutt*, 314 A.2d 481, 485 (D.C. 1974). While there apparently is no decision by the District of Columbia Court of Appeals in which the meaning of the words "fraud" and "dishonesty" in the context of a fidelity bond is discussed, the ordinary meaning of the words "fraud" and "dishonesty" refers to acts which "show a breach of trust or of financial integrity, *coupled with* deceit and concealment exercised in a position of trust and confidence and causing financial loss." COUCH ON INSURANCE § 46:54 (2d ed. 1982) (emphasis added).[5] The actions of PATCO officials in appropriating funds for the 1981 strike, which was supported by most of the union membership, do not reflect a corrupt intent to deceive or to defraud the membership; nor do they reveal a breach of financial integrity, as would be

[5] Couch further defines "'[d]ishonesty,' in general terms, [as] 'a want of integrity in principle; a want of fairness and straightforwardness; a disposition to defraud, deceive, or betray; faithlessness, or a course of conduct generally characterized in the common speech of men as lacking in principle'." *Id.* (quoting *American Surety Co. v. Joy Lodge F. & A.M.*, 102 Ind. App. 82, 196 N.E. 356 (1935)). *See also* 35 AM. JUR. 2d *Fidelity Bonds and Insurance* § 23 (1967) ("The words 'fraud' and 'dishonesty', in this connection, are deemed to include any act showing a want of integrity or a breach of trust, or an abstraction of funds, together with deceit and concealment.") (footnote omitted).

the case if larceny, theft or embezzlement of PATCO funds was involved. Therefore, the bond does not protect PATCO against the kind of conduct of which appellants complain.

IV.

The legislative history of the Labor-Management Reporting and Disclosure Act (LMRDA) demonstrates that § 502(a)'s bonding requirement covers only fraudulent or dishonest behavior relating to the handling of union funds. When LMRDA was first enacted in 1959, § 502(a) required that union officials be bonded for faithful dis-[7]charge of duty. However, in 1965, Congress, by amendment, removed the faithful discharge of duty language and inserted language requiring a bond to protect against loss by "fraud or dishonesty." Both the House and Senate Reports relating to these amendments state:

> The question has been raised as to whether or not the proposed substitution would dilute the protections afforded to union funds, and whether or not the fraud or dishonesty bond would adequately cover the violations of section 501(a) of the act.
>
> Solicitor of Labor Charles Donahue [in a letter to the Chairman of the General Subcommittee on Labor] states that it is and has been the position of the Department that *the bond required by section 502(a) need not cover all violations of section 501(a)*. This position is expressed in an interpretative [sic] bulletin promulgated by then Secretary of Labor Mitchell shortly after the Labor-Management Reporting and Disclosure Act was enacted which states in part:

> "The bonding requirement in section 502(a) relates only to duties of the specified personnel in connection with their handling of funds or other property to which this section refers. It *does not have reference to the special duties imposed upon representatives of labor organizations by virtue of the position of trust which they occupy*, which are dealt with in section 501(a), and for which civil remedies for breach of the duties are provided in section 501(b). The fact that the bonding requirement is limited to personnel who handle funds or other property indicates the correctness of these conclusions. They find further support in the differences between sections 501(a) and 502(a) of the act which sufficiently indicate that the scope of the two sections is not coextensive."

The committee endorses the soundness of that interpretation. [8] H. REP. NO. 182, 89th Cong., 1st Sess. 4; S. Rep. No. 698, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3248, 3250-51 (emphasis added).[6]

The Department of Labor regulations interpreting 29 U.S.C. § 502 provide:

> The bonding requirement in section 502(a) relates only to duties of the specified personnel in connec-

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[6] The House and Senate Committee Reports contain the "supplemental views" of three members who conditioned their support for the amendment on the understanding that the new language reflected "a clarification, not a change, in the bonding requirements under the act." 1965 U.S. CODE CONG. & AD. NEWS at 3254. Those "supplemental views" were not included in the body of the Committee Reports and were not adopted by the Committees. The Committee Reports indicate that a motivating factor behind the change was avoidance of the higher premiums charged for a bond which included the faithful discharge language. *Id.* at 3249.

> tion with their handling of funds or other property to which this section refers. It does not have reference to the special duties imposed upon representatives of labor organizations by virtue of the positions of trust which they occupy, which are dealt with in section 501(a), and for which civil remedies for breach of the duties are provided in section 501(b).

29 C.F.R. § 453.11 (1986).

The regulations also discuss the meaning of "fraud or dishonesty" as follows:

> The term "fraud or dishonesty" shall be deemed to encompass all those risks of loss that might arise through dishonest or fraudulent acts in handling of funds. . . . As such, the bond must provide recovery for loss occasioned by such acts . . . provided that within the law of the state in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. As usually applied under state laws, the term "fraud or [9] dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss.

29 C.F.R. § 453.12 (1986).

Appellants suggest that the words "abstraction," "misappropriation" and "misapplication" in the regulations are sufficiently broad to reach a union officer's expenditures of PATCO funds for the strike. However,

> the terms "wrongful abstraction" and "wilful misapplication" are [generally] used in association with

> such terms as "fraud," "dishonesty," "larceny" or "embezzlement". As a consequence, such terms have been deemed to supplement the other terms describing various types of corrupt conduct by employees, rather than to establish a new class of acts covered by the bond.

9A Appleman, INSURANCE LAW AND PRACTICE § 5670 (1981) (footnotes omitted). Appleman also notes that while

> [s]ome courts have intimated that any violation of duty or breach of instructions in the handling of the employer's funds or property would constitute a wrongful abstraction or misapplication, regardless of the employee's intent . . . it is generally held that the employee's misappropriation or misapplication must be done with a dishonest or fraudulent intent . . . .

Id. (footnotes omitted).

In essence, appellants are seeking to equate the honesty bond which PATCO purchased from F & D with a faithful performance of duty bond. But in the light of the bond language and the legislative history of the LMRDA, appellants may not prevail pursuant to that approach. Accordingly, the judgment below is

Affirmed.

APPENDIX B

Memorandum Opinion of the U.S. District Court for the District of Columbia

April 7, 1987

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[104] Anthony SKIRLICK, et al., Plaintiffs,

v.

PATCO, et al., Defendants.

Civ. A. No. 84-2371.

United States District Court,
District of Columbia.

April 7, 1987.

[105] MEMORANDUM OPINION

SPORKIN, District Judge.

I. Introduction

This is an action on a bond. Plaintiffs are air traffic controllers who did not join their fellow Professional Air Traffic Controllers Organization ("PATCO") members in the 1981 air traffic controllers strike.[1] They are suing to recover on a surety bond carried on their union leaders. Their theory is that by conducting an illegal strike, the

[1] Over seventy percent of the federally employed air traffic controllers walked off the job on August 3, 1981 after PATCO and the Federal Aviation Administration ("FAA") failed to agree on a new collective bargaining agreement. *See PATCO v. FLRA*, 685 F.2d 547, 551 (D.C.Cir.1982). Although the government obtained restraining orders against the strike, *see e.g., United States v. PATCO*, 524 F.Supp. 160 (D.D.C.1981), *Graham v. PATCO*, 524 F.Supp.160 (D.D.C.1981), and contempt citations when these restraining orders were not followed, *see e.g., Air Transport Assn. of America v. PATCO*, 516 F.Supp. 1108 (D.C.N.Y.1981), *United States v. Phillips*, 527 F.Supp. 1361 (N.D.Ill.1981), the strikers refused to return to work. President Reagan then fired some 11,500 who did not return to work by an August 5, 1981 deadline. *See PATCO v. United States Department of Transportation*, 529 F.Supp. 614 (D.Minn.1982).

union leaders engaged in activity covered by the bond[2] and that therefore, the bonding company must honor its commitment.

The bonding company—the only defendant left in the case—interposes four defenses as a matter of law: first, that plaintiffs have no standing since only the union's trustee in bankruptcy can bring a claim on the bond; second, that plaintiffs have failed to fulfill the conditions precedent on the bond; third, that the acts complained of do not constitute "fraud or dishonesty" in the handling of funds, which is what the bond covers; and fourth, that plaintiffs knew of similar behavior by the PATCO officers in the past—that is, an earlier strike engaged in by those leaders—about which they did not inform the defendant, and thus they are now barred from bringing this claim. Because I find that the plaintiffs' action was not timely filed and that the bond at issue was not intended to cover the actions complained of, I grant defendant's motion for summary judgment and need not reach the other issues raised by the defendants.

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[2] The activities complained of which plaintiffs believe are covered by the bond are generally set forth in paragraph 73 of the Complaint filed in this action. Paragraph 11 of a prior Complaint filed by plaintiff in the United States Bankruptcy Court for the District of Columbia sets forth these actions with greater specificity:

> 11. Union funds have been made available for, *inter alia*, the payment of salaries to perform illegal acts, travel expenses to perform illegal acts, publication of materials to engender illegal acts, and counsel fees to defend the defendants charged with civil contempt and violations of 5 U.S.C. § 7311; such acts were detrimental to the union and its lawful membership and a breach of the fiduciary duties of the defendants.

Memorandum of Points and Authorities in Support of Defendant Fidelity & Deposit Company of Maryland's Motion for Summary Judgment ("Def.Br.") at 24 (citing Bankruptcy Complaint, ¶ 11).

[106] II. Timeliness

Defendant alleges that the plaintiffs have failed to comply with two provisions in the bond agreement relating to the time for bringing an action on the bond. *First*, the bond requires that the insured file a detailed proof of loss, duly sworn to, with defendant, within four months after the discovery of loss. *Second*, the bond provides that no action shall lie against the defendant "at all unless commenced within one year from the date when the Insured discovers the loss." The plaintiffs' loss was discoverable in August of 1981, at the time of the strike, so a proof of loss should have been filed by the end of 1981, and an action should have been commenced by August of 1982. Neither of these deadlines was met.[3]

Plaintiffs ask the Court to excuse their delay for several reasons. First, they argue:

> Until April of 1982 [the plaintiffs] did not know to whom to give notice. That information was in the control of PATCO's "leaders," the wrongdoers. Not knowing to whom to provide the information rendered is not only impracticable but impossible to do so. Secondly, the overtime demands on these controllers during the period before April of 1982 left little time for them to pursue their claim, or at least impeded that ability and made it impracticable to do so.

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[3] Plaintiffs appear to argue that because the air traffic controllers strike was so well known, the defendant had notice of a pending claim from the time of the strike. This argument misses the point. While defendant certainly can be held to have had knowledge of the *strike* itself, it would be inequitable to hold that defendant had any idea this type of claim would be filed pursuant to the strike. This is a novel reading of a surety bond. If anything, in bringing an action as unique as this one, the plaintiffs should be more strictly bound by the time limitations of the contract. Otherwise, potential plaintiffs could spend years thinking up new actions under a bond and the company would have no protection whatsoever.

Opposition to Defendant Fidelity & Deposit Company of Maryland's Motion for Summary Judgment ("Pl.Br.") at 32. (Plaintiffs go so far as to suggest that the defendant acted in concert with the striking union members to deprive the non-striking members of any information concerning the bond. Pl.Br. at 30-31, 44.) But, even if I accept this April, 1982 date as the time at which to start the clock, the plaintiffs still failed to give the defendant a proper proof of claim within four months and still failed to bring this action within one year.

Plaintiffs then fall back on a second argument to explain their delay from April of 1982—they claim they were relying on the union's trustee in bankruptcy, and could not bring this action until the trustee allowed them to. *See e.g.*, Pl.Br. at 28-30 *citing Hough v. PATCO*, Case No. 81-00656, Adv. No. 82-0093, (Bankr.D.D.C., Dec. 20, 1983) ("the trustee is the only party in interest to pursue any such causes of action . . .") This argument is also misplaced though, because, although the bankruptcy case stayed actions against the union, it in no way impeded the plaintiffs from pursuing this claim against the bonding company. Moreover, to the extent plaintiffs believed only the trustee could bring this case against the bonding company, plaintiffs could have brought an action against the trustee forcing him to give them the claim before the limitations period ran. What they should *not* have done was sit on the claim and then attempt to argue that their delay should be excused.

Failing in these two arguments, plaintiffs finally contend that the notice provisions of the bond conflict with a union member's right to sue their unions, as guaranteed by the Labor-Management Reporting and Disclo-

sure Act of 1959 ("LMRDA"), Section 101(a)(4), as amended, 29 U.S.C. § 411(a)(4),[4] and therefore that such notice requirements are unenforceable. Pl.Br. at 35-44. I do not believe that enforcement of these contractual provisions conflicts in any manner with the union member's right to sue as guaranteed by § 101(a)(4). First, I note that this type of bond provision has been approved by the [**107**] Department of Labor. Second, unlike the plaintiffs, I fail to see any significant relationship between the bonding requirements of § 502 and the Bill of Rights guarantees of § 101(a)(4) and thus cannot see how enforcing the notice provisions of this union contract will undercut the union members statutorily guaranteed rights.

Plaintiffs have failed to come forward with any compelling reason why they should be excused from the contractually-agreed to time limitations on bringing an action against the bond company. Accordingly, the case must be dismissed as untimely. But, even if the action were not dismissed as untimely, it would have to be dismissed because the parties did not bargain for a bond to cover the actions complained of here.

III. Fraud or Dishonesty

PATCO's leaders were bonded by defendants to protect the union against acts by these officials amounting to "fraud or dishonesty." The fact pattern in this case does not involve any of the usual characteristics of fraud or dishonesty; rather, plaintiffs would have the Court undertake a uniquely broad reading of the "fraud or dishon-

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[4] The pertinent language reads, "No labor organization shall limit the right of any member thereof to institute an action in any court . . ." 29 U.S.C. § 411(a)(4).

esty" provision so as to cover actions taken by the PATCO leaders in furtherance of their illegal strike against the federal government.

In their most succinct statement of how the union officials who led this strike violated the fraud or dishonesty provision of the bond, plaintiffs argue:

> In conducting an illegal strike, and then refusing to obey the court order directing them back to work, the individually named defendants, who were bonded by defendant F. & D., clearly acted in disregard of PATCO's interest. These union officers knowingly violated 5 U.S.C. § 7116(b)(7) which prohibits strikes by Federal employees and, thus, triggered § 7120(f) of the statute which calls for the decertification of labor organizations that conduct illegal strikes. Additionally, these officers caused jointly owned union funds to be spent in furtherance of such illegal conduct. In doing so, these defendants subjected the union to a significant "likelihood of loss;" in light of both the strike prohibition and decertification provision, it was practically a foregone conclusion that the strikers would be fired and the union decertified. Thus, the monies spent in furtherance of the strike would never be recouped.

Pl.Br. at 48-49. *See also* footnote 2, *supra*.

While the plaintiffs' case has surface appeal, it is clear that the acts for which they wish to recover are neither the type of activity for which the LMRDA, 29 U.S.C. § 502(a), requires union leaders to be bonded, nor the type intended to be covered by the parties (the union and the defendant) to the specific bonding agreement at issue here. This is so for five reasons. *First*, the language and legislative history of the LMRDA—and its implementing regulations—are clear that Congress intended to require

the simple type of surety bonds normally utilized by banks and other institutions; nothing in either the legislative history or the implementing regulations supports the expansive reading plaintiffs would have the Court adopt.

The LMRDA requires union leaders to be bonded to protect the union against fraudulent and dishonest acts by those handling the union funds. Specifically, the LMRDA provides as follows:

> Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed $5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded *to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others*. . . . Any person who is not covered by such bonds shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested.

29 U.S.C. § 502(a) (emphasis supplied). The United States Department of Labor **[108]** issues regulations which implement the bonding requirements of the LMRDA. These Labor Department regulations delineate what is meant to be covered by the "fraud or dishonesty" terms of the Act:

> The term "fraud or dishonesty" shall be deemed to encompass all those risks of loss that might arise through dishonest or fraudulent acts in handling of funds as delineated in §§ 453.8 and 453.9. As such, the bond must provide recovery for loss occasioned by such acts . . . , provided that within the law of the state in which the act

> is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. *As usually applied under state laws, the term "fraud or dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss.*

29 C.F.R. § 453.12 (emphasis supplied). Nothing, therefore, in the statute itself nor in its implementing regulations supports a broad reading of "fraud or dishonesty" to cover the actions of union leaders in engaging in a strike, even though the strike was illegal.

Second, the state law and state court interpretations of surety bonds referenced by the Labor Department regulations do not support plaintiffs' novel theory of recovery. Indeed, the plaintiffs cannot point to—nor was the Court able to find—any cases in the District of Columbia, or in any state, in which acts comparable to those complained of here have been held to trigger recovery under an surety bond.

Third, the acts the plaintiffs complain of are also not the type the parties to the bond agreement intended to be a part of that agreement. In the area of bonding as in other insurance areas, there must be a clear understanding of the parties as to coverage. There was no agreement that this type of activity would be covered. The union deliberately chose to be covered by a "fraud or dishonesty" bond, not by a broader bond for the faithful discharge of duty. *See* Def.Br. at 45. In so doing, it limited the liability of the defendants to instances commonly contemplated within the meaning of "fraud or dishonesty." The actions complained of here simply do not fall within that definition.

Fourth, I find that there are compelling policy reasons for not reading this bond as plaintiffs suggest. Extending the definition of what is covered by LMRDA-required bonds might well make the costs of simple surety bonds prohibitive, thereby creating an atmosphere in which unions would not be able to get the kind of protection which is contemplated by the statute.

Fifth, I am also concerned that the prohibitive acts complained of in this case were not secretive and could not have been implemented without the acquiescence of a vast majority of the union membership. The union membership, which is the party to be protected by this bond, could have prevented the illegal strike if the members had so desired.

IV. Conclusion

Plaintiffs did not file this case within the time limitations established in the bond contract. Further, they have been unable to support their contentions that they are entitled to collect under the union's surety bond. While I can appreciate the plaintiffs' plight following the disastrous consequences of this clearly misguided strike with which they disagreed, there is no legal basis on which to grant them the novel relief they seek in this action.

APPENDIX C

Plaintiffs' Answers to Defendant Fidelity & Deposit Company of Maryland's First Set of Interrogatories

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SKIRLICK, *et al.*, Plaintiffs, v. PATCO, *et al.*, Defendants.	Civil Action No. 84-2371 Hogan, J.

PLAINTIFFS' ANSWERS TO DEFENDANT FIDELITY & DEPOSIT COMPANY OF MARYLAND'S FIRST SET OF INTERROGATORIES

Come now the plaintiffs, Anthony Skirlick, *et al.*, and by Anthony Skirlick do hereby respond to the first set of interrogatories propounded to the plaintiffs by the defendant Fidelity & Deposit Company of Maryland (hereinafter "Fidelity").

INTERROGATORIES.

Interrogatory 1. State the name, address, residence and business address and telephone number, and date of birth of the person answering these interrogatories.

Answer 1. Anthony J. Skirlick, Jr.
25775 Parada Drive
Valencia, California 91355
(805) 259-4997

Interrogatory 2. Identify the bond or bonds upon which you base your claim which is the subject of this action against Fidelity & Deposit Company of Maryland, including the date, bond number, number of pages, and number and caption of riders thereof or thereto.

Answer 2. The policy(ies) of insurance or bond(s) upon which suit is brought in this matter are all of the policies, or bonds issued by Fidelity to or for PATCO for the years 1980, 1981 and/or 1982. Other than this general description, plaintiffs are not now in a position to further identify said policy(ies) of insurance or bond(s) or the riders thereto. *And see* response to defendant Fidelity's requests for admission numbered one, two, three, four and five, simultaneoulsy filed herewith.

Interrogatory 3. State whether the bond or bonds on which you base your claim against Fidelity & Deposit Company of Maryland (hereinafter "Bond") only names as the Insured the "Professional Air Traffic Controllers Organization" and/or "Local Nos. 103, 291, 304, 316, 352, 503, and 541." If not, state all reasons and facts in support of your denial.

Answer 3. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* plaintiffs' response to Defendant Fidelity's request for admission numbered one, simultaneously filed herewith, which response by this reference is incorporated as a part of this answer.

Interrogatory 4. State whether the Bond names Fidelity & Deposit Company of Maryland (hereinafter "Fidelity & Deposit") as Underwriter. If not, state all reasons and facts in support of your denial.

Answer 4. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to infor-

mation or data which are relevant and/or material. *And see* response to defendant Fidelity's request for admission numbered two, simultaneously filed herewith, which response, by this reference, is made a part of this answer.

Interrogatory 5. State whether Section 1 of the Insuring Agreement in the Bond states, "Loss is covered under this bond only if discovered not later than one year from the end of the Bond Period." If not, state all reasons and facts in support of your denial.

Answer 5. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* response to defendant Fidelity's request for admission numbered three, simultaenously filed herewith, which response, by this reference, is made a part of this answer.

Interrogatory 6. State whether Section 5 of the Insuring Agreement of the Bond states:

> Upon knowledge or discovery of loss under this bond, the Insured shall: (a) give notice thereof as soon as practicable to the Underwriter and (b) file detailed proof of loss, duly sworn to, with the Underwriter within four months after the discovery of loss.
>
> * * *
>
> No action shall lie against the Underwriter unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this bond, nor until ninety days after the required proofs of loss have been filed with the Underwriter, nor at all

> unless commenced within one year from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to bae fixed by agreement under any statute controlling the construction of this bond, the shortest permissable statutory limitation of time shall govern and shall supersede the time limitation herein stated.

If not, state all reasons and facts in support of your denial.

Answer 6. As to this litigation, this interrogatory, excepting perhaps as to the last sentence of the quoted material, is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* response to request for admission numbered four, simultaneously filed herewith, which response, by this reference, is made a part of this answer.

Interrogatory 7. State whether the liability of the Underwriter was, at all times relevant to your claim, subject to Rider F 1691, such that the Insuring Agreement of the Bond provides:

> The Underwriter, in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations, and other terms of this bond agrees to indemnify the Insured in accordance with such of the Schedules as are specifically designated by the insertion of an amount of indemnity in Item 3 of the Declarations against the loss of funds or other property which the Insured shall sustain and discover as provided in Section 1 through any fraudulent or dishonest acts committed by any Em-

> ployees, acting alone or in collusion with others, the amount of indemnity on each of such Employees being the amount or amounts stated in Schedule A, B and C, respectively, whichever is applicable to such Employees as provided in Section 7.

If not, state all reasons and facts in support of your denial.

Answer 7. For the reasons set forth in response to Defendant Fidelity's request for admission numbered five, simultaneously filed herewith, plaintiffs cannot now respond to this interrogatory; said response, by this reference, is made a part of this answer.

Interrogatory 8. State whether Plaintiffs have even been recognized or certified as consituting the Professional Air Traffic Controllers Organization (or any affiliated organization) by any court or Government agency. If so, identify the court or agency, the date and circumstances of such action, and and all documents evidencing such action.

Answer 8. Yes. See records of certification before the Federal Labor Relations Authority.

Interrogatory 9. State when you discovered the loss which is the subject of this action.

Answer 9. At or about August of 1981; the full extent of the losses suffered, however, remains to be ascertained.

Interrogatory 10. State whether you filed a detailed proof of loss, duly sworn to, with Fidelity & Deposit, within four months of the date given in response to Interrogatory No. 9. If so, identify the date of the notice, to whom it was delivered, and its contents (in lieu of

identifying the contents of such document, at your option, attach a copy to your answers to these interrogatories).

Answer 10. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms, said interrogatory is not designed to lead to information or data which are relevant and/or material.

Interrogatory 11. State when you first became aware of any loss of PATCO assets and/or of any member benefits as a result of the PATCO strike action.

Answer 11. See answer to interrogatory numbered nine (9), *supra*, the answer to which interrogatory is hereby adopted as the answer to this interrogatory.

Interrogatory 12. State whether you filed a detailed proof of loss, duly sworn to, with Fidelity & Deposit, within four months of the date given in response to Interrogatory No. 11. If so, identify the date of the notice, to whom it was delivered, and its contents (in lieu of identifying the contents of such document, at your option, attach a copy to your answers to these interrogatories).

Answer 12. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms, said interrogatory is not designed to lead to information or data which are relevant and/or material.

Interrogatory 13. State whether you ever filed any detailed proof of loss, duly sworn to, with Fidelity & Deposit. If so, identify the date of the notice, the method and date of delivery, to whom it was delivered, and its contents (in lieu of identifying the contents of such document, at your option, attach a copy to your answers to these interrogatories).

Answer 13. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms, said interrogatory is not designed to lead to information or data which are relevant and/or material.

Interrogatory 14. State whether an action was filed against Fidelity & Deposit for the loss which is the subject of this action within one year from the date given in response to Interrogatory No. 9. If so, identify the date of filing, the plaintiffs, the court of jurisdiction, the case caption and action number, the date a Summons against Fidelity & Deposit was issued, and the date and method of service.

Answer 14. *See* plaintiffs' response to defendant Fidelity's requests for production of documents numbered three, four and five, simultaneously submitted herewith, which responses are hereby adopted as the answer to this interrogatory.

Interrogatory 15. State whether any other action was filed alainst Fidelity & Deposit for the loss which is the subject of this action. If so, identify the date of filing, the plaintiffs, the court of jurisdiction, the case caption and action number, the date a Summons against Fidelity & Deposit was issued, and the date and method of service.

Answer 15. *See* answer to interrogatory numbered fourteen (14), *supra*, which answer is adopted as the answer to this interrogatory.

Interrogatory 16. If you contend that any employees [sic] of PATCO committed any fraudulent or dishonest acts resulting in the loss of funds or other porperty by you and/or PATCO, identify with specificity the nature and circumstances of such acts and the participating parties.

Answer 16. Plaintiffs do so contend, and the full answer to this interrogatory will be provided pursuant to the stipulation filed this date.

/s/
Anthony Skirlick

County of Los Angeles)
) ss:
State of California)

On this 2nd day of April, 1985, before me, a notary in and for aforesaid jurisdiction personally appeared Anthony Skirlick, who is personally known to me and who after taking oath in due form, swore that the answers to the foregoing interrogatories subscribed by him are true to the best of his knowledge, information and belief.

/s/
Notary Public

My commission expires: 2-5-88 (SEAL)

APPENDIX D

Plaintiffs' Supplemental Answers to Defendant Fidelity & Deposit Company of Maryland's First Set of Interrogatories

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SKIRLICK, *et al.*, Plaintiffs, v. PATCO, *et al.*, Defendants.	Civil Action No. 84-2371 Hogan, J.

PLAINTIFFS' SUPPLEMENTAL ANSWERS TO DEFENDANT FIDELITY & DEPOSIT COMPANY OF MARYLAND'S FIRST SET OF INTERROGATORIES FILED PURSUANT ORDER OF COURT

Come now the plaintiffs, Anthony Skirlick, *et al.*, and by Anthony Skirlick do hereby supplementally respond to the first set of interrogatories propounded to the plaintiffs by the defendant Fidelity & Deposit Company of Maryland (hereinafter "Fidelity"), in accordance with the order of this court filed May 2, 1985.

THE INTERROGATORIES.

I. *Preface.*

The original of the bonds have still not been located. During their depositions, Mrs. McGuire and Mr. Burke, employees of Fidelity, compiled the bond numbered 596-06-43-A. Mrs. McGuire also compiled the bond numbered 596-06-43-B. Plaintiffs have no reason to doubt the credibility of these witnesses and, therefore, and for the purpose of these supplemental answers to interrogatories, will utilize said bonds as compiled by them. Records relating to Bond numbered 606-98-81, for the "PATCO Sussistence Fund" were subject to systematic destruction

by Fidelity. No answer below refers to this bond. As always, in the event the plaintiffs discover other, different or supplemental information in this respect, they reserve their right to further supplement their answers to these, and in fact all, interrogatories. With these caveats the following supplamental answers are provided:

Interrogatory 3. State whether the bond or bonds on which you base your claim against Fidelity & Deposit Company of Maryland (hereinafter "Bond") only names as the Insured the "Professional Air Traffic Controllers Organization" and/or "Local Nos. 103, 291, 304, 316, 352, 503, and 541." If not, state all reasons and facts in support of your denial.

Original Answer 3. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* plaintiffs' response to Defendant Fidelity's request for admission numbered one, simultaneously filed herewith, which response by this reference is incorporated as a part of this answer.

Supplemental Answer. Although page one of the Labor Organization Bond numbered 596-06-43-A identifies the insured as "Professional Air Traffic Controllers Organization and its Subordinate Units listed as Joint Insureds in Rider 'A'," and an undated Rider under said bond identifies PATCO and Locals 103, 291, 304, 316, 352, 503 and 541 and "Rider A," dated September 22, 1977, lists said Locals as "joint insureds," other riders expand or reduce coverage: Rider 5 removes Local 541, effective July 30, 1978, and adds Locals 132 and 502; Rider 7 adds Local 245; Rider 8 adds Local 110; Rider 9

adds Locals 102 and 303; Rider 10 adds Local 133; Rider 11 adds Local 258, Rider 13 adds Local 131; Rider 14 adds Local 403; Rider 17 adds Local 501; Rider 18 adds Locals 160 and 514; Rider 19 adds Local 204; and Rider 20 adds Local 215. All said changes were made on or before November 1, 1980. Bond numbered 596-04-43-B identifies no Locals, but does identify PATCO as the insured.

Interrogatory 4. State whether the Bond names Fidelity & Deposit Company of Maryland (hereinafter "Fidelity & Deposit") as Underwriter. If not, state all reasons and facts in support of your denial.

Original Answer 4. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* response to defendant Fidelity's request for admission numbered two, simultaneously filed herewith, which response, by this reference, is made a part of this answer.

Supplemental Answer 4. Yes, both bonds.

Interrogatory 5. State whether Section 1 of the Insuring Agreement in the Bond states, "Loss is covered under this bond only if discovered not later than one year from the end of the Bond Period." If not, state all reasons and facts in support of your denial.

Original Answer 5. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* response to defendant Fidelity's request for

admission numbered three, simultaenously filed herewith, which response, by this reference, is made a part of this answer.

Supplemental Answer 5. Yes, both bonds.

Interrogatory 6. State whether Section 5 of the Insuring Agreement of the Bond states:

> Upon knowledge or discovery of loss under this bond, the Insured shall: (a) give notice thereof as soon as practicable to the Underwriter and (b) file detailed proof of loss, duly sworn to, with the Underwriter within four months after the discovery of loss.
>
> * * *
>
> No action shall lie against the Underwriter unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this bond, nor until ninety days after the required proofs of loss have been filed with the Underwriter, nor at all unless commenced within one year from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to bae fixed by agreement under any statute controlling the construction of this bond, the shortest permissable statutory limitation of time shall govern and shall supersede the time limitation herein stated.

If not, state all reasons and facts in support of your denial.

Original Answer 6. As to this litigation, this interrogatory, excepting perhaps as to the last sentence of the quoted material, is both irrelevant and immaterial and,

further, by its own terms said interrogatory is not designed to lead to information or data which are relevant and/or material. *And see* response to request for admission numbered four, simultaneously filed herewith, which response, by this reference, is made a part of this answer.

Supplemental Answer 6. Yes, both bonds.

Interrogatory 7. State whether the liability of the Underwriter was, at all times relevant to your claim, subject to Rider F 1691, such that the Insuring Agreement of the Bond provides:

> The Underwriter, in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations, and other terms of this bond agrees to indemnify the Insured in accordance with such of the Schedules as are specifically designated by the insertion of an amount of indemnity in Item 3 of the Declarations against the loss of funds or other property which the Insured shall sustain and discover as provided in Section 1 through any fraudulent or dishonest acts committed by any Employees, acting alone or in collusion with others, the amount of indemnity on each of such Employees being the amount or amounts stated in Schedule A, B and C, respectively, whichever is applicable to such Employees as provided in Section 7.

If not, state all reasons and facts in support of your denial.

Original Answer 7. For the reasons set forth in response to Defendant Fidelity's request for admission numbered five, simultaneously filed herewith, plaintiffs cannot now respond to this interrogatory; said response, by this reference, is made a part of this answer.

Supplemental Answer 7. Rider F 6624 changes each bond from a "faithful discharge of duties bond" to a "fraud or dishonest" bond, and the quoted language as modified by said Rider, appears. Still, the language "subject to Rider F 1691" appearing in this interrogatory renders the question vague and imprecise as "F 1691" only relates to "dues collectors, shop stewards or shop chairmen," while Rider F 6624 relates to specific provisions of the insuring agreements.

Interrogatory 8. State whether Plaintiffs have even been recognized or certified asconstituting the Professional Air Traffic Controllers Organization (or any affiliated organization) by any court or Government agency. If so, identify the court or agency, the date and circumstances of such action, and and all documents evidencing such action.

Original Answer 8. Yes. See records of certification before the Federal Labor Relations Authority.

Supplemental Answer 8. *See* copy of certificate annexed as Exhibit 1, and copy of PATCO Constitution annexed as Exhibit 2.

Interrogatory 10. State whether you filed a detailed proof of loss, duly sworn to, with Fidelity and Deposit, within four months of the date given in response to Interrogatory No. . If so, identify the date of the notice, to whom it was delivered, and its contents (in lieu of identifying the contents of such document, at your option, attach a copy to your answers to these interrogatories.

Original Answer 10. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by

its own terms, said interrogatory is not designed to lead to information or data which are relevant and/or material.

Supplemental Answer 10. Neither of the named plaintiffs did so.

Interrogatory 12. State whether you filed a detailed proof of loss, duly sworn to, with Fidelity & Deposit, within four months of the date given in response to Interrogatory No. 11. If so, identify the date of the notice, to whom it was delivered, and its contents (in lieu of identifying the contents of such document, at your option, attach a copy to your answers to these interrogatories).

Original Answer 12. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms, said interrogatory is not designed to lead to information or data which are relevant and/or material.

Supplemental Answer 12. Neither of the named plaintiffs did so.

Interrogatory 13. State whether you ever filed any detailed proof of loss, duly sworn to, with Fidelity & Deposit. If so, identify the date of the notice, the method and date of delivery, to whom it was delivered, and its contents (in lieu of identifying the contents of such document, at your option, attach a copy to your answers to these interrogatories).

Original Answer 13. As to this litigation, this interrogatory is both irrelevant and immaterial and, further, by its own terms, said interrogatory is not designed to lead to information or data which are relevant and/or material.

Supplemental Answer 13. Yes. After a telephone conversation on April 27, 1982 with John R. Pinkett, Inc., counsel for the plaintiffs delivered to the defendant, Fidelity, through John R. Pinkett, Inc., a copy of the proposed complaint of certain nonstriking members of PATCO as filed in the United States Bankruptcy Court for the District of Columbia. Said complaint specifically identifies (¶ 11) certain acts which plaintiffs then, and here, aver to constitute acts within the ambit of Fidelity's bond. *See* Speicher Deposition Exhibits 3 and 6, and Deposition, pp. 18-20. *See also* Rule 911, Bankruptcy Rules (1981).

_____

Anthony Skirlick

County of)
) ss:
State of California)

On this ____ day of June, 1985, before me, a notary in and for aforesaid jurisdiction personally appeared Anthony Skirlick, who is personally known to me and who after taking oath in due form, swore that the answers to the foregoing interrogatories subscribed by him are true to the best of his knowledge, information and belief.

_____

Notary Public

My commission expires: _____ .

Respectfully submitted,

/s/
Glenn H. Carlson, Esquire
Henney, Carlson & Warren, P.C.
Suite 209
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 965-7040

/s/
Stephen A. Weitzman, Esquire
Suite 300
818 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-9190

Counsel to Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SKIRLICK, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 84-2371
PATCO, *et al.*,	)	Hogan, J.
Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL ANSWERS TO DEFENDANT FIDELITY & DEPOSIT COMPANY OF MARYLAND'S FIRST SET OF INTERROGATORIES

Come now the plaintiffs, Anthony Skirlick, *et al.*, and by Anthony Skirlick do hereby supplementally respond to interrogatory numbered sixteen (16) of the first set of interrogatories propounded to the plaintiffs by the defendant Fidelity & Deposit Company of Maryland (hereinafter "Fidelity").

INTERROGATORY

Interrogatory 16. If you contend that any employees [sic] of PATCO committed any fraudulent or dishonest acts resulting in the loss of funds or other property by you and/or PATCO, identify with specificity the nature and circumstances of such acts and the participating parties.

Supplemental Answer 16. And further, upon information and belief, the individual defendants, excluding Teresa E. Green and Cecilia Kessler, individually, and in conjunction with each other, did alter and modify, in violation of law and the PATCO constitution, the list of individuals whose votes would be counted in the "strike

vote" which was taken on August 2, and August 3, 1981. On June 24, 1981, what your deponent viewed to be a "strike vote" was taken; in that vote an eighty (80%) percent affirmative vote was required to ratify a "strike," and said percentage was not obtained on that date. In order to obtain the eighty (80%) percent figure in the August 2-3 vote the officers and directors of PATCO, including the named defendants and each of them, excepting Ms. Green and Ms. Kessler, conspired to obtain the eighty (80%) percent vote required to ratify a strike at all cost; specifically said defendants intentionally failed to count, and did knowingly reject from the tally, the votes of those PATCO members who were, *inter alia*, (i) near retirement, (ii) were in training, (iii) were on sick leave, or (iv) were disabled. And that, said acts were dishonest and fraudulent.

Further, following the strike of August 3, 1981, the defendants and each of them, acting alone and in conspiracy one with another, instituted or caused to be instituted litigations against certain of PATCO's members to force them to pay PATCO dues and fees, and that such claims were, under the circumstances, and in the view of your deponent, fraudulently and dishonestly made.

/s/
Anthony Skirlick

County of Los Angeles)
) ss:
State of California)

On this 31st day of May, 1985, before me, a notary in and for the aforesaid jurisdiction personally appeared

Anthony Skirlick, who is personally known to me and who after taking oath in due form, swore that the answers to the foregoing interrogatories subscribed by him are ture to the best of his knowledge, information and belief.

/s/
Notary Public

My commission expires: July 9, 1985

(SEAL)

Respectfully submitted,

Glenn H. Carlson, Esquire
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(202) 965-7040

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(202) 887-9190

Counsel to Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SKIRLICK, *et al.*, Plaintiffs,	
v.	Civil Action No. 84-2371
PATCO, *et al.*, Defendants.	Hogan, J.

PLAINTIFFS' SUPPLEMENTAL ANSWERS TO DEFENDANT FIDELITY & DEPOSIT COMPANY OF MARYLAND'S FIRST SET OF INTERROGATORIES

Come now the plaintiffs, Anthony Skirlick, *et al.*, and by Anthony Skirlick do hereby respond to interrogatory numbered sixteen (16) of the first set of interrogatories propounded to the plaintiffs by the defendant Fidelity & Deposit Company of Maryland (hereinafter "Fidelity").

INTERROGATORIES

Interrogatory 16. If you contend that any employees [sic] of PATCO committed any fraudulent or dishonest acts resulting in the loss of funds or other property by you and/or PATCO, identify with specificity the nature and circumstances of such acts and the participating parties.

Answer 16. PATCO, through the named individual defendants, acting individually and as the board of directors of PATCO, its agents, officers and employees, planned and executed an illegal strike against the United States. PATCO used its funds to organize the strike, to solicit the membership to participate in the illegal strike and to execute the strike. That in the course of those

acts, the PATCO leadership made certain private representations to the membership about the consequences (or lack of consequences) of such a strike, knowing those representations to be false at the time they were made. Further union funds were utilized to pay lawyers to defend numerous strikers in numerous courts against criminal charges arising from the strike. The total sums of monies spent on these efforts is unknown, but believed to be in the millions of dollars. Such actions contravened the laws of the United States and were against the terms and policies set forth in the PATCO constitution.

In addition, PATCO through its board, officers, agents, and employees improperly spent union funds to obtain political assurances that a strike would not precipitate loss of jobs.

PATCO improperly established a subsistance fund which ultimately became a "strike fund." The payments to this fund were assessed against the union membership. The fund was utilized in contravention of the laws of the United States, which fund (approximately $4.5 million) was lost to the union, as in substantial part it was awarded to the Air Transport Association ("ATA") in payment of damages owed by PATCO to ATA for the strike.

All the above acts were done in violation of the trust and fiduciary responsibilities of PATCO's board, and officers and its agents and were of themselves dishonest and fraudulent within the meaning of those terms, as utilized in L.M.R.D.A. 29 U.S.C. § 502.

This answer will be updated with specific instances and references as same become apparent to the plaintiffs in the

course of their review of PATCO documents and other discovery.

/s/
Anthony Skirlick

County of Los Angeles)
) ss:
State of California)

On this 9th day of May, 1985, before me, a notary in and for the aforesaid jurisdiction personally appeared Anthony Skirlick, who is personally known to me and who after taking oath in due form, swore that the answers to the foregoing interrogatories subscribed by him are true to the best of his knowledge, information and belief.

/s/
Notary Public

My commission expires: 2-5-88

(SEAL)

Respectfully submitted,

/s/
Glenn H. Carlson, Esauire
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Suite 209
2600 Virginia Avenue, N.W.
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(202) 965-7040

APPENDIX E

STATUTES AND REGULATIONS

Labor-Management Reporting and Disclosure Act

SAFEGUARDS FOR LABOR ORGANIZATIONS

29 U.S.C. § 501. Fiduciary responsibility of officers of labor organizations.

(a) Duties of officers; exculpatory provisions and resolutions void. The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and ex-

penses. When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made *ex parte*. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Embezzlement of assets; penalty. Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both. (Sept. 14, 1959, P.L. 86-257, Title V, section 501, 73 Stat. 535.)

29 U.S.C. § 502. Bonding of officers and employees of labor organizations; amount, form, and placement of bonds; penalty for violation.

(a) Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed $5,000.00 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others. The bond of each such person shall be fixed at the beginning of the organization's fiscal year and shall be in an amount not less than ten (10%) percent of the funds handled by him or his predecessor or predecessors, if any, during the preceding fiscal year, but in no case more than $500,000.00. If the labor organization or the trust in which a labor organization is interested does not have a preceding fiscal year, the amount of the bond shall be, in the case of a local labor organization, not less than $1,000.00, and in the case of any other labor organization or of a trust in which a labor organization is interested, not less than $10,000.00. Such bonds shall be individual or schedule in form, and shall have a corporate surety company as surety thereon. Any person who is not covered by such bonds shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested. No such bond shall be placed through an agent or broker or with a surety company in which any labor organization or any officer, agent, shop steward, or other representative of a labor organization

has any direct or indirect interest. Such surety company shall be a corporate surety which holds a grant of authority from the Secretary of the Treasury under the Act of July 30, 1947 (6 U.S.C., sections 6-13), as an acceptable surety on Federal bonds: Provided, That when in the opinion of the Secretary a labor organization has made other bonding arrangements which would provide the protection required by this section at comparable cost or less, he may exempt such labor organization from placing a bond through a surety company holding such grant of authority.

(b) Any person who willfully violates this section shall be fined not more than $10,000.00 or imprisoned for not more than one year, or both. (Sept. 14, 1959, P.L. 86-527, Title V, section 502, 73 Stat. 536; Sept. 29, 1965, P.L. 89-216, section 1, 79 Stat. 888.)

CODE OF FEDERAL REGULATIONS (1981)

29 C.F.R.:

Part 453—GENERAL STATEMENT CONCERNING BONDING REQUIREMENTS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

INTRODUCTION

Section 453.1 Scope and significance of this part.

(a) *Functions of the Department of Labor.* This part discusses the meaning and scope of section 502 of the Labor-Management Reporting and Disclosure Act of 1959[1] (hereinafter referred to as the Act), which requires

[1] 73 Stat. 536; 29 U.S.C., section 502.

the bonding of certain officials, representatives, and employees of labor organizations and of trusts in which labor organizations are interested. The provisions of section 502 are subject to the general investigatory authority of the director, Office of Labor-Management Standards Enforcement, embodied in section 601 of the Act which empowers him to investigate whenever he believes it necessary in order to determine whether any person has violated or is about to violate any provisions of the Act (except Title I or amendments to other statutes made by section 505 or Title VII). The Department of Labor is also authorized, under the general provisions of section 607, to forward to the Attorney General, for appropriate action, any evidence of violations of section 502 developed in such investigations, as may be found to warrant criminal prosecution under the Act or other Federal law.

(b) *Purpose and effect of interpretations.* Interpretations of the Labor-Management Services Administrator with respect to the bonding provisions are set forth in this part to provide those affected by these provisions of the Act with "a practical guide *** as to how the office representing the public interest in its enforcement will seek to apply it."[2] The correctness of an interpretation can be determined finally and authoritatively only by the courts. It is necessary, however, for the Labor-Management Services Administrator to reach informed conclusions as to the meaning of the law to enable him to carry out his statutory duties of administration and enforcement. The interpretations of the Labor-Management Services Administrator contained in this part, which are issued upon the advice of the Solicitor of Labor, indicate the construction of the law which will guide him in

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[2] Skidmore v. Swift & Co., 323 U.S. 134, 138.

performing his duties unless and until he is directed otherwise by authoritative rulings of the courts or unless and until he subsequently decides that a prior interpretation is incorrect. However, the omission to discuss a particular problem in this part or in interpretations supplementing it, should not be taken to indicate the adoption of any position by the Labor-Management Services Administrator with respect to such problem or to constitute an administrative interpretation or practice.

(c) *Earlier interpretations superseded.* To the extent that prior opinions and interpretations under the Act, relating to the bonding of certain officials, representatives, and employees of labor organizations and of trusts in which labor organizations are interested, are inconsistent or in conflict with the principles stated in this part, they are hereby rescinded and withdrawn.

* * *

Section 453.3 Labor organizations within the coverage of section 502(a).

Any labor organization as defined in sections 3(i) and 3(j) of the Act[3] is a labor organization within the coverage of section 502(a) unless its property and annual financial receipts do not exceed $5,000.00 in value. The determination as to whether a particular labor organization is excepted from the application of section 502(a) is to be made at the beginning of each of its fiscal years on the basis of the total value of all its property at the beginning of, and its total financial receipts during, the preceding fiscal year of the organization.

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[3] See Part 451 of this chapter.

* * *

Section 453.7 "Funds or other property" of a labor organization or of a trust in which a labor organization is interested.

The affirmative requirement for bonding the specified personnel is applicable only if they handle "funds or other property" of the labor organization or trust concerned. A consideration of the purpose of section 502 and a reading of the section as a whole, including provisions for fixing the amount of bonds, suffice to show that the term "funds or other property," as used in this section of the Act, encompasses more than cash alone but that it does not embrace all of the property of a labor organization or of a trust in which a labor organization is interested. The term does not include property of a relatively permanent nature, such as land, buildings, furniture, fixtures and office and delivery equipment used in the operations of a labor organization or trust. It does, however, include items in the nature of quick assets, such as checks and other negotiable instruments, government obligations and marketable securities as well as cash, and other property held, not for use, but for conversion into cash or for similar purposes making it substantially equivalent to funds.

Section 453.8 Personnel who "handle" funds or other property.

(a) *General considerations.* Section 502(a) requires "every" person specified in its bonding requirement "who handles" funds or other property of the labor organization or trust to be bonded. It does not contain any exemption based on the amount of the funds or other property handled by particular personnel. Therefore, if the bonding requirement is otherwise applicable to such

persons, the amount of the funds or the value of the property handled by them does not affect such applicability. In determining whether a person "handles" funds or other property within the meaning of section 502(a), however, it is important to consider the term "handles" in the light of the basic purpose which Congress sought to achieve by the bonding requirement and the language chosen to make that purpose effective. Thus, while it is clear that section 502(a) should be considered as representing the minimum requirements which Congress deemed necessary in order to insure the reasonable protection of the funds and other property of labor organizations and trusts within the coverage of the section, it is equally clear from the legislative history and the language used that Congress was aware of cost considerations and did not intend to require unreasonable, unnecessary or duplicative bonding. In terms of these general considerations, more specific content may be assigned to the term "handles" by reference to the prohibition in Section 502(a) against permitting any person not covered by an appropriate bond "to receive, handle, disburse, or otherwise exercise custody or control" of the funds or other property of a labor organization or of a trust in which a labor organization is interested. The phrase "receive, handle, disburse, or otherwise exercise custody or control" is not to be considered as expanding the scope of the term "handles" but rather as indicating facets of "handles" which in a specific prohibition, Congress believed should be clearly set forth.

(b) *Persons included generally*. The basic objective of section 502(a) is to provide reasonable protection of funds or other property rather than to insure against every conceivable possibility of loss. Accordingly, a per-

son shall be deemed to be "handling" funds or other property, so as to require bonding under that section, whenever his duties or activities with respect to given funds or other property are such that there is a significant risk of loss by reason of fraud or dishonesty on the part of such person, acting either alone or in collusion with others.

(c) *Physical contact as criterion of handling.* Physical dealing with funds or other property is, under the principles above stated, not necessarily a controlling criterion in every case for determining the persons who "handle" within the meaning of section 502(a). Physical contact with cash, checks or similar property generally constitutes "handling." On the other hand, bonding may not be required for office personnel who from time to time perform counting, packaging, tabulating or similar duties which involve physical contact with checks, securities, or other funds or property but which are performed under conditions that cannot reasonably be said to give rise to significant risks with respect to the receipt, safekeeping or disbursement of funds or property. This may be the case where significant risks of fraud or dishonesty in the performance of duties of an essentially clerical character are precluded by the closeness of the supervision provided or by the nature of the funds or other property handled.

(d) *"Handling" funds or other property without physical contact.* Personnel who do not physically handle funds or property may nevertheless "handle" within the meaning of section 502(a) where they have or perform significant duties with respect to the receipt, safekeeping or disbursement of funds or other property. For example, persons who have access to a safe deposit box or

similar depository for the purpose of adding to, withdrawing, checking or otherwise dealing with its contents may be said to "handle" those contents within the meaning of section 502(a) even though they do not at any time during the year actually secure such access for such purposes. Similarly, those charged with general responsibility for the safekeeping of funds or other property such as the treasurer of a labor organization, should be considered as handling funds or other property. It should also be noted that the extent of actual authority to deal with funds or property may be immaterial where custody or other functions have been granted which create a substantial risk of fraud or dishonesty. Thus, if a bank account were maintained in the name of a particular officer or employee whose signature the bank were authorized to honor, it could not be contended that he did not "handle" funds merely because he had been forbidden by the organization or by his superiors to make deposits or withdrawals.

(e) *Disbursement of funds or other property.* It is clear from both the purpose and language of section 502(a) that personnel described in the section who actually disburse funds or other property, such as officers or trustees authorized to sign checks or persons who make cash disbursements must be considered as handling such funds and property. Whether others who may influence, authorize or direct disbursements must also be considered to handle funds or other property can be determined only by reference to the specific duties or responsibilities of these persons in a particular labor organization or trust. [28 F.R. 14394, Dec. 27, 1963, as amended at 30 F.R. 14925, Dec. 2, 1965]

Section 453.9 "Handling" of funds or other property by personnel functioning as a governing body.

(a) (1) *General considerations.* For many labor organizations and trusts special problems involving disbursements will be presented by those who, as trustees or members of an executive board or similar governing body, are, as a group, charged with general responsibility for the conduct of the business and affairs of the organization or trust. Often such bodies may approve contracts, authorize disbursements, audit accounts and exercise similar responsibilities.

(2) It is difficult to formulate any general rule for such cases. The mere fact that a board of trustees, executive board or similar governing body has general supervision of the affairs of a trust or labor organization, including investment policy and the establishment of fiscal control, would not necessarily mean that the members of this body "handle" the funds or other property of the organization. On the other hand, the facts may indicate that the board or other body exercises such close, day-to-day supervision of those directly charged with the handling of funds or other property that it might be unreasonable to conclude that the members of such board were not, as a group, also participating in the handling of such funds and property.[8] Also, whether or not the members of a particular board of trustees or executive board handle funds or other property in their capacity as such, certain of these members may hold other offices or have other functions involving duties directly related to the receipt, safekeeping or disbursement of the funds or other property of the organization so that it would be necessary that they be bonded irrespective of their board membership.

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[8] As to group coverage, see section 453.16.

(b) *Nature of responsibilities as affecting "handling."* With respect to particular responsibilities of boards of trustees, executive boards and similar bodies in disbursing funds or other property, much would depend upon the system of fiscal controls provided in a particular trust or labor organization. The allocation of funds or authorization of disbursements for a particular purpose is not necessarily handling of funds within the meaning of the section. If the allocation or authorization merely permits expenditures by a disbursing officer who has responsibility for determining the validity or propriety of particular expenditures, then the action of the disbursing officer and not that of the board would constitute handling. But if pursuant to a direction of the board, the disbursing officer performed only ministerial acts without responsibility to determine whether the expenditures were valid or appropriate, then the board's action would constitute handling. In such a case, the absence of fraud or dishonesty in the acts of the disbursing officer alone would not necessarily prevent fraudulent or dishonest disbursements. The person or persons who are charged with or exercise responsibility for determining whether specific disbursements are *bona fide*, regular, and in accordance with the applicable constitution, trust instrument, resolution or other laws or documents governing the disbursement of funds or other property should be considered to handle such funds and property and be bonded accordingly.

[28 F.R. 14394, Dec. 27, 1963, as amended at 30 F.R. 14926, Dec. 2, 1965]

* * *

Section 453.11 The nature of the "duties" to which the bonding requirement relates.

The bonding requirement in section 502(a) relates only to duties of the specified personnel in connection with their handling of funds or other property to which this section refers. It does not have reference to the special duties imposed upon representatives of labor organizations by virtue of the positions of trust which they occupy, which are dealt with in section 501(a), and for which civil remedies for breach of the duties are provided in section 501(b). The fact that the bonding requirement is limited to personnel who handle funds or other property indicates the correctness of these conclusions. They find further support in the differences between sections 501(a) and 502(a) of the Act which sufficiently indicate that the scope of the two sections is not coextensive.

Section 453.12 Meaning of fraud or dishonesty.

The term "fraud or dishonesty" shall be deemed to encompass all those risks of loss that might arise through dishonest or fraudulent acts in handling of funds as delineated in sections 453.8 and 453.9. As such, the bond must provide recovery for loss occasioned by such acts even though no personal gain accrues to the person committing the act and the act is not subject to punishment as a crime or misdemeanor, provided that within the law of the state in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. As usually applied under state laws, the term "fraud or dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss. [30 F.R. 14926, Dec. 2, 1965]

AMOUNT OF BONDS

Section 453.13 The statutory provision.

Section 502(a) of the Act requires that the bond of each "person" handling "funds or other property" who must be bonded be fixed "at the beginning of the organization's fiscal year *** in an amount not less than 10 percentum of the funds handled by him and his predecessor or predecessors, if any, during the preceding fiscal year, but in no case more than $500,000.00." If there is no preceding fiscal year, the amount of each required bond is set at not less than $1,000.00 for local labor organizations and at not less than $10,000.00 for other labor organizations or for trusts in which a labor organization is interested.

Section 453.14 The meaning of "funds."

While the protection of bonds required under the Act must extend to any actual loss from the acts of fraud or dishonesty in the handling of "funds or other property" (section 453.7), the amount of the bond depends upon the "funds" handled by the personnel bonded and their predecessors, if any. "Funds" as here used is not defined in the Act. As in the case of "funds or other property" discussed earlier in section 453.7, the term would not include property of a relatively permanent nature such as land, buildings, furniture, fixtures, or property similarly held for use in the operations of the labor organization or trust rather than as quick assets. In its normal meaning, however, "funds" would include, in addition to cash, items such as bills and notes, government obligations and marketable securities, and in a particular case might well include all the "funds or other property" handled

during the year in the positions occupied by the particular personnel for whom the bonding is required. In any event, it is clear that bonds fixed in the amount of ten (10) percent or more of the total "funds or other property" handled by the occupants of such positions during the preceding fiscal year would be in amounts sufficient to meet the statutory requirement. Of course, in situations where a significant saving in bonding costs might result from computing separately the amounts of "funds" and of "other property" handled, criteria for distinguishing particular items to be included in the quoted terms would prove useful. While the criteria to be applied in a particular case would depend on all the relevant facts concerning the specific items handled, it may be assumed as a general principle that at least those items which may be handled in a manner similar to cash and which involve a like risk of loss should be included in computing the amount of "funds" handled. [30 F.R. 14926, Dec. 2, 1965]

* * *

FORMS OF BONDS

Section 453.18 Bonds "individual or schedule in form."

(a) *General consideration.* In addition to such substantive matters as the personnel who must be bonded and the scope and the amount of the prescribed bonds, which have been discussed previously, the form of the bonds is the subject of a specific provision of section 502(a). Under this provision, a bond meeting the substantive requirements of the section may be either "individual or schedule in form." These terms are not specially defined and could be descriptive of a variety of possible forms of

bonds. According to trade usage, an individual bond is a single bond covering a single named individual to a designated amount, and bonds "schedule in form" may include either name schedule or position schedule bonds. A name schedule bond is typically a single bond covering a series or list of named individuals, each of whom is bonded separately to a designated amount. A position schedule bond is typically a single bond providing coverage with respect to any occupant or holder of one or more specified positions during the term of the bond, each office or position being covered to a designated amount. In a statute relating to trade or commerce, it is frequently helpful to consider whatever trade or commercial usages may have developed with respect to the statutory terms.[9] References to individual, schedule and position schedule bonds may be found in other acts of Congress and indicate a clear awareness of trade usages and terminology in this field.[10]

(b) *Particular forms of bonds.* If the phrase "individual or schedule in form" is considered in light of the trade usages, section 502(a) at least permits bonds which are individual, name schedule or position schedule in form. Of course, section 502(a) does not require any particular type of individual or schedule bonds where different types exist or may be developed. It could not be said, for example, that a bond which schedules positions according to similarities in duties, risks, or required amounts of coverage is not "schedule in form" within the meaning of section 502(a) merely because the particular form of scheduling involved was not employed in bonds current

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[9] See 2 Sutherland, Statutory Construction (3d ed. 1943), section 4919.

[10] Act of August 24, 1954, 68 Stat. 335, 12 U.S.C., section 1766 (g); Act of August 9, 1955, 69 Stat. 618, 6 U.S.C., section 14.

at the time the section became law. A more specific illustration would be a bond scheduling shop stewards as a group because of the similar duties they perform in collecting dues, or members of an executive board as a group because of the fact that duties are imposed upon the board as such. A bond of this type would be "schedule in form" within the meaning of section 502(a) and assuming adequacy of amount and coverage of all persons whom it is necessary to bond, such a bond would be in conformity with the statute. Also, a bond scheduling positions or groups of positions according to amounts of funds handled by occupants of the positions could be viewed as "schedule in form."

(c) *Additional bonding.* Section 502(a) neither prevents additional bonding beyond that required by its terms nor prescribes the form in which such additional coverage may be taken. Thus, so long as a particular bond is schedule in form as to the personnel required to be bonded and schedules coverage of these persons in at least the minimum required amount, additional coverage either as to personnel or amount may be taken in any form either in the same or in separate bonds. A bond which provided name or position schedule coverage for all persons required to be bonded under section 502(a), each scheduled person or position being bonded in at least the required minimum amount, would clearly be "schedule in form" within the meaning of section 502(a) regardless of the extent or form of additional schedule or blanket coverage provided in the same bond.

* * *

MISCELLANEOUS PROVISIONS

Section 453.22 Prohibition of certain activities by unbonded persons.

(a) Section 502(a) provides that persons who are not covered by bonds as required by that section shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested. This prohibits personnel who are required to be bonded, as explained in section 453.8 from performing any of these acts without being covered by the required bonds. In addition, this provision makes it unlawful for any person with power to do so to delegate or assign the duties of receiving, handling, disbursing, or otherwise exercising custody or control of such funds or property to any person who is not bonded in accordance with the provisions of section 502(a).

(b) The legislative history of the Act indicates, however, that it was not the intent of Congress to make compliance with the bonding requirements of section 502(a) a condition on the right of banks or other financial institutions to serve as the depository of the funds of labor organizations or trusts. Similarly, it appears that the provisions of that section do not require the bonding of brokers or their independent contractors who have contracted with labor organizations or trusts for the performance of functions which are normally not carried out by such labor organizations' or trusts' own officials or employees, such as the buying of securities, the performance of other investment functions, or the transportation of funds by armored truck.[12]

Section 453.23 Persons becoming subject to bonding requirements during fiscal year.

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[12] See section 453.6(b)

Considering the purpose of section 502, the language of the prohibition should be considered to apply to persons who because of election, employment or change in duties begin to handle funds or other property during the course of a particular fiscal year. Bonds should be secured for such persons, in an amount based on the funds handled by their predecessors during the preceding fiscal year, before they are permitted to engage in any of the fund-handling activities referred to in the prohibition, unless coverage with respect to such persons is already provided by bonds in force meeting the requirements of section 502(a).

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No. 88-739

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

ANTHONY SKIRLICK, *et al.*,

Petitioners,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent disagrees with the questions presented by Petitioners in the petition for certiorari. The questions presented are based on a totally flawed interpretation of the decision of the court below. The Court of Appeals did not grant sureties on Labor Organization Bonds required by the Labor-Management Reporting and Disclosure Act ("LMRDA") an absolute immunity "simply" because the union officials bonded by those sureties did not conceal the acts giving rise to liability under the bond. The Court of Appeals also did not hold that the notoriousness of such acts is a defense to liability under LMRDA § 502(a) for sureties who have bonded such union officials who commit such acts. Rather, the Court correctly considered the circumstances of the acts by the Professional Air Traffic Controllers Organization ("PATCO") officials bonded by Respondent as one of many factors in deciding that the acts alleged to constitute "fraud or dishonesty" in the handling of funds did not fall within the coverage of the Labor Organization Bond.

The attacks of Petitioners on the decision of the Court of Appeals are wholly without merit.

The questions presented for review are:

1. Whether Petitioners' allegations of the acts taken by PATCO officials in furtherance of the 1981 strike by PATCO members can fall within the definition of "fraud or dishonesty" in handling of funds, as that term is used by LMRDA § 502(a) and in the Labor Organization Bond written by Respondent.

2. Whether, in determining whether certain acts constitute "fraud or dishonesty" in the handling of funds, as that term is used by LMRDA § 502(a), the trier of fact may consider as a factor that the acts were open and notorious and supported by most of the parties ultimately to be protected by the Labor Organization Bond.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent, Fidelity & Deposit Company of Maryland ("Fidelity"), by its counsel, pursuant to Rule 22 of the Supreme Court Rules, submits this brief in opposition to the petition for certiorari.

STATEMENT OF THE CASE

I. The Proceedings Below

Petitioners allege themselves to be members of the Professional Air Traffic Controllers Organization ("PATCO") who did not participate in the 1981 strike by the PATCO membership. Petitioners brought this action in the United States District Court for the District of Columbia against individual officers and directors of PATCO seeking damages they claim to have suffered resulting from that strike.

Additionally, Petitioners set forth one claim against Respondent Fidelity. Petitioners seek to recover under a Labor Organiza-

tion Bond, a type of fidelity bond, whereunder PATCO was the insured and Fidelity was the underwriter. This Labor Organization Bond was required by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 502(a), which requires labor organization officers who handle funds to be bonded to provide protection against loss by reason of acts of fraud or dishonesty.

Following discovery, Fidelity moved for summary judgment on four separate grounds. After extensive briefing by the parties and oral argument, on April 17, 1987, District Judge Stanley Sporkin granted summary judgment in favor of Fidelity.[1]

One of the grounds relied on by Judge Sporkin was that the alleged acts by the PATCO officers and directors in furtherance of the strike did not, as a matter of law, constitute "fraud or dishonesty" as that term is used in fidelity bonds.[2] On June 22, 1987, a final judgment in favor of Fidelity and certification under Federal Rule of Civil Procedure 54(b) were entered. Petitioners then appealed to the United States Court of Appeals for the District of Columbia Circuit.

On August 5, 1988, the Court of Appeals affirmed the grant of summary judgment in favor of Fidelity.[3] The Court of Appeals reached only one of the two grounds relied on by Judge Sporkin and agreed with the lower court that the alleged action by the bonded PATCO officers and directors in furtherance of the 1981

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[1] *Skirlick v. PATCO*, 659 F. Supp. 104 (D.D.C. 1987), *aff'd*, 852 F.2d 1376 (D.C. Cir. 1988); A at lla-19a.

[2] Judge Sporkin also found that Petitioners failed to comply with certain conditions precedent contained in the Bond. These conditions required that a detailed proof of loss be submitted within four months of the discovery of loss and that any action on the Bond must be filed within a year of the date of the discovery of the loss. Judge Sporkin found that these bond terms were enforceable and that Petitioners' delay in attempting to satisfy these conditions was unexcused.

Judge Sporkin did not reach the two other separate grounds advanced by F&D in favor of summary judgment, that is, that Petitioners lacked standing to bring a claim on the bond since the union's trustee in bankruptcy was the only proper party to do so and that Petitioners' prior notice of PATCO provisions for a sanctioned job action barred their claim on the Bond.

[3] *Skirlick v. Fidelity & Deposit Co. of Md.*, 852 F.2d 1376 (D.C. Cir. 1988); A at la-10a.

strike did not fall within the bond coverage as those acts did not constitute "fraud or dishonesty."

II. The 1981 PATCO Strike

Since the early 1970's, PATCO was the exclusive bargaining representative for air traffic controllers employed by the Federal Aviation Administration ("FAA"). In 1981, the then-existing collective bargaining agreement was due to expire. PATCO and the FAA reached a tentative agreement in June 1981, but that agreement was overwhelmingly rejected by the union membership. PATCO announced a strike deadline of August 3, 1981, and, on that date, PATCO struck the FAA. Over seventy per cent of the federally employed air traffic controllers walked off the job.[4]

The Government obtained restraining orders against the strike[5] and then contempt citations when the restraining orders were not followed.[6] Pursuant to an order of President Reagan,[7] some 11,000 striking air traffic controllers who did not return to work by 11:00 a.m. on August 5, 1981, were fired.[8]

III. Prior Proceedings by Petitioners

On November 25, 1981, PATCO filed a Petition for Reorganization in the United States Bankruptcy Court for the District of Columbia. Subsequently, Petitioner Hough and two others moved to intervene in the suit instituted by the United States against PATCO in response to the strike.[9] They maintained, as

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[4] *See PATCO v. FLRA*, 685 F.2d 547, 551 (D.C. Cir. 1982).

[5] *See, e.g., United States v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981); *Graham v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981).

[6] *See, e.g., United States v. PATCO*, 107 L.R.R.M. (BNA) 3210 (D.D.C. 1981) (civil contempt); *United States v. Phillips*, 527 F. Supp. 1361 (N.D. Ill. 1981) (criminal contempt). *But see United States v. PATCO*, 525 F. Supp. 820 (E.D. Mich. 1981) (civil contempt fines vacated after firing); *United States v. PATCO*, 524 F. Supp. 160 (D.D.C. 1981) (civil contempt order vacated after firing).

[7] *Air Traffic Controllers Strike*, 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981).

[8] *See PATCO v. United States Dep't of Transp.*, 529 F. Supp. 614 (D. Minn. 1982).

[9] Motion for Leave to Intervene, *United States v. PATCO*, Civil Action No. 81-1805 (D.D.C.).

they claimed in the action in the district court below, that the air traffic controllers who walked off the job could not be considered lawful members of PATCO. They sought a declaratory judgment to that effect and additionally asked the Court to find that only the air traffic controllers who did not walk off the job were the sole lawful members of PATCO. In addition, they sought leave to file a cross-claim against all but two of the individual defendants in that action which persons are among those named as individual defendants in the action below.

The Court ultimately considered on the merits the relief requested. In a memorandum order issued May 19, 1982, Judge Gasch denied the motion based on the applicants' failure "to advance their novel theories" in a timely fashion.[10]

In the interim, the applicants asserted their novel theories of relief in two other forums. On January 4, 1982, one filed a Complaint with the Assistant Secretary of Labor for Labor Management Relations. The Assistant Secretary dismissed the Complaint on February 3, 1982. [11] A request for reconsideration was not granted.[12]

In addition, on April 9, 1982, Petitioner Hough and the other two applicants brought an adversary action in the United States Bankruptcy Court for the District of Columbia. The Complaint named as defendants PATCO, Robert E. Poli, Robert Meyer, Michael Ferman, Gary W. Eads, Dominic Torchia, George W. Brandon, David Siegel, Charles Campbell, Larry Phillips, David Trick, and Dennis Reardon, who are all among the individual defendants in the instant action below. Fidelity was not named as a defendant. Once again, the applicants sought, *inter alia*, declaratory relief that they and others similarly situated were the only lawful members of PATCO; that the defendants be ordered to ac-

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[10] *United States v. PATCO*, Civil Action No. 81-1805, memorandum op. at 10 (D.D.C. May 19, 1982).

[11] *See* Exhibit 2 to Proposed Answer of Applicants for Intervention, Counterclaim, and Cross-Claim Against Original Individual Defendants Requesting Declaratory, Injunctive and Other Relief, *United States v. PATCO*, *supra*, n.9.

[12] *Id.*, Exhibit 3 thereto.

count for expenditures of union funds; and that monetary relief for alleged improper expenditures of union funds be awarded.[13]

The defendants filed a motion for summary judgment on July 13, 1982, and the plaintiffs filed a cross-motion for summary judgment. Following oral argument, by order dated December 22, 1983, the defendants' motion was granted and summary judgment was entered in their favor against the plaintiffs.[14]

On July 9, 1982, Petitioner Skirlick, as a purported representative of "the class of non-striking PATCO members during and/or after the illegal strike" filed a Proof of Claim in the PATCO bankruptcy proceeding in the sum of $130,000,000.00.[15] The grounds of liability were essentially the same claims asserted in Petitioners' Complaint below. At approximately the same time, Petitioners also submitted to the Bankruptcy Court a proposed Bankruptcy Court Complaint against PATCO, Gary Eades, Dominic Torchia, other members of the PATCO Board of Directors, and Fidelity.

On May 19, 1984, the PATCO Trustee in bankruptcy deemed the claim to be "unliquidated and unsubstantiated" and recommended that the claim be disallowed.[16] On June 28, 1984, Petitioners filed a Motion for Relief from Automatic Stay, seeking a modification of the automatic stay to allow them to file against PATCO the proposed complaint in "another forum." After oral argument, a consent agreement was entered into and approved by the Honorable George F. Bason, Jr., which, *inter alia*, provided:

- the claim was disallowed; and
- the Trustee abandoned, on behalf of the estate, any interest in the bond claim.

An order to this effect was entered on July 26, 1984. [17]

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[13] Complaint, *Hough v. PATCO*, Case No. 81-00656, Adv. Proc. No. 82-0093 (Bankr. D.C.C.).

[14] *Id.*, Order for Summary Judgment.

[15] Proof of Claim (#91), *In re PATCO*, Case No. 81-00656, (Bankr. D.D.C.).

[16] *Id.*, Objection to Claim No. 91 and Notice of Hearing.

[17] *Id.*, Order re Claim 91 and Motion for Relief from Automatic Stay Filed by Anthony J. Skirlick, Jr., *et al.*

Petitioners subsequently commenced the instant action below on August 1, 1984.

IV. The Labor Organization Bond Terms

Petitioners identified two Labor Organization Bonds, numbered 596-06-43-A and 596-06-43-B, as the bond or bonds on which they base their claim against Fidelity.[18] Bond No. 596-06-43A went into effect on September 22, 1977, and was cancelled on September 22, 1981, to be superceded or replaced by Bond No. 596-06-43-B.[19] For purposes of this petition, which of the bonds might cover the period when Petitioners' alleged loss arose need not be addressed, as both bonds have the same essential terms. They differ significantly only in the amounts of indemnity and in the identity of the scheduled insureds.[20]

The essential terms of the Bonds are as follows:

Bond 596-06-43-A names PATCO and certain subordinate locals as the "Insured."[21] Bond 596-06-43-B names PATCO as the "Insured."[22] The Bonds name Fidelity as "Underwriter."[23]

The Insuring Agreement in both Bonds was subject to a rider such that it provided:

> *The Underwriter,* in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations, and other terms of this bond *agrees to indemnify the Insured* in accordance with such of the Schedules as are specifically designated by the insertion of any amount of indemnity in Item 3 of the Declaration *against the loss of funds or other property which the Insured shall sustain* and discover as provided in Section 1 *through any fraudulent or dishonest acts committed by any Employees*, acting alone or in collusion with others,

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[18] A at 28a-29a.
[19] Quoted in A at 5a.
[20] *Id.*
[21] A at 29a-30a.
[22] A at 30a.
[23] *Id.*

> the amount of indemnity on each of such Employees being the amount of amounts stated in Schedule A, B and C, respectively, whichever is applicable to such Employees as provided in Section 7. [24]

This coverage for "fraud or dishonesty" was mandated by the 1965 amendments to the LMRDA. Although coverage for "faithful performance of duties" may have been available, as was required prior to the 1965 amendments, PATCO was aware that the Labor Organization Bond written by Fidelity would not provide this more broadly worded coverage.[25]

V. Petitioners' Allegations of "Fraud or Dishonesty"

In response to interrogatories propounded by Fidelity in the district court below, Petitioners set forth the actions that they contend constitute fraudulent or dishonest acts resulting in the loss of funds or other property by them or PATCO.[26] Essentially, Petitioners alleged that the individual defendants planned and organized the PATCO strike and utilized union funds in connection with or in support of the strike. In June 1985, in a supplemental answer to this interrogatory, Petitioners raised new allegations that some of the individual defendants excluded some members of PATCO (or their votes) to arrive at an eighty percent (80%) majority to ratify the strike. They further alleged that the individual defendants caused litigation to be constituted against certain PATCO members to force them to pay PATCO dues and fees and that these actions also constituted "fraudulent and dishonest acts."[27]

SUMMARY OF ARGUMENT

This case does not warrant review by this Honorable Court because there are neither special nor important reasons presented and because the decision below was not in error.

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[24] A at 32a (emphasis added).
[25] *See* at A at 18a.
[26] A at 37a-38a.
[27] A at 40a-41a.

Since 1981, Petitioners have pursued in a variety of forums their claims that they are entitled to damages or other relief against officers and directors of PATCO for their role in supporting the strike by the air traffic controllers. To date, every effort has been rebuffed.

The derivative claim made against Fidelity is equally meritless. The LMRDA requires a bond to protect against loss of union funds resulting from any "fraudulent or dishonest acts" in the handling of such funds by employees. Petitioners submit that the strike action was in violation of federal law and illegal and argue that acts in furtherance of the strike therefore fall within the coverage provided by the Labor Organization Bond required by the LMRDA and written by Fidelity.

From the outset of the litigation below, there was a substantial question whether the bond would provide coverage for such acts. Accordingly, it was agreed that this would be the initial matter to be decided by the Court. Petitioners set forth in response to interrogatories the acts which they contend fell under the bond. For purposes of the motion for summary judgment, these allegations were considered in the light most favorable to Petitioners. Both the District Court and the Court of Appeals concluded that the acts complained of were simply not the type which the Labor Organization Bond was intended to cover.

The LMRDA does not define what is meant by "fraudulent or dishonest" acts. Rather, the legislative history and the implementing regulations make it clear that trade usages and interpretations of similar bonds by state courts should be looked to. The facts giving rise to liability in those authorities are a far cry from the types of allegations raised by Petitioners. In addition, the interpretation of the phrase "fraudulent or dishonest acts," as that term is used in fidelity bonds, set forth by the Court of Appeals is wholly consistent with the guidance available from District of Columbia cases which have construed other similar fidelity bonds.

The Court of Appeals also relied upon two leading treatises on insurance law in coming to the conclusion it reached. Petitioners maintain that the Court should have decided the question as the District of Columbia Court of Appeals would have and they attack the propriety of the Circuit Court in referring to those

"secondary sources." It was appropriate for the Court of Appeals to consider these authorities because, on numerous occasions, the District of Columbia Court of Appeals has done so and presumably could have followed the same course had the issue been before it.

Petitioners also misconstrue or mischaracterize the basis of the decision by the Court of Appeals. While it properly considered that the PATCO leadership openly supported the strike, and further that the vast majority of the PATCO membership voted in favor of the strike, the Circuit Court did not "simply" conclude that this open or notorious nature of the officers' actions immunizes the surety on the bond from liability, as Petitioners contend. Rather, these facts were properly considered as one of many factors in determining that the acts did not constitute "fraud or dishonesty" under the guidelines of the LMRDA legislative history, the implementing regulations, District of Columbia case law, and other appropriate authorities.

The lack of any clear precedent evidences the uniqueness of the facts and issues in this case. It is unquestionable that there are no conflicts among lower courts to be resolved. Accordingly, neither the legal issue raised by Petitioners nor the specific facts presented are likely to be considered before other courts and there is no need for this Honorable Court to render a decision on a case of such limited significance. Indeed, even if a similar case were to arise, unless it was based on acts taking place in the District of Columbia and was thus governed by District of Columbia law, the courts below would look to their respective state law for the scope of the phrase "fraud or dishonesty" in the context of a fidelity bond. Thus, the petition should be denied for the reason that there are neither special nor important reasons to review the decision below, as well as for the reason that no error is presented.

ARGUMENT/REASONS FOR DENYING THE WRIT

I. This Case Does Not Merit Review Under Accepted Standards For Certiorari

This case meets none of the established criteria for certiorari. There are simply no special or important reasons to review the decision below.

It is not contended that there is a conflict between decisions of federal courts of appeals. Indeed, there are apparently no decisions whatsoever involving the scope of coverage of a fidelity bond required by LMRDA § 502(a), much less one where the acts giving rise to liability took place in the District of Columbia so that local D.C. law would govern.

Further, the factual nature of the claims by Petitioners is without precedent. Petitioners have not cited to a single case where actions in furtherance of an illegal strike were found or even asserted to constitute "fraud or dishonesty" within the meaning of a fidelity bond required by LMRDA § 502(a), much less a bond that was not prescribed by statute. This fact is reflective of the novel, but meritless, nature of Petitioners' claims and buttresses the correctness of the courts below in dismissing those claims.

Not only did the PATCO Trustee in bankruptcy consider Petitioners' related claims to be "unsubstantiated" and Judge Gasch characterize Petitioners' theories as "novel," there is no reported case law involving even remotely similar facts. Rather, the few reported cases involving claims under bonds required under LMRDA § 502(a) are based on allegations that the bonded union officers misappropriated union funds for their own benefit or for the benefit of friends or relatives.[28] As Fidelity contended and the Court of Appeals (and the District Court) agreed, unlike the instant claim, that fact pattern is the archetypical situation which a fidelity bond is intended to address. The very different claim made by Petitioners under the PATCO bond is unique and thus is unlikely to reoccur.

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[28] *See, e.g., Giordani v. Hoffman*, 295 F. Supp. 463, 467 (E.D. Pa. 1969).

While Fidelity believes Petitioners' claim under the bond to be unique for the reason that it is no more than an imaginative, but meritless, effort to find the proverbial "deep pocket" defendant, it cannot be denied that there is no evidence that the concerns raised by Petitioners, if the decision below stands, have been a source of concern to anyone else. The errors claimed by Petitioners are, at best, episodic[29] and are unlikely to reoccur.[30] As such, the issues raised by Petitioners are not important questions of federal law which should be decided by this Honorable Court.

Alternatively, for purposes of deciding whether this case merits review by this Court, there would have to be a conflict between the United States Court of Appeals for the District of Columbia Circuit and the District of Columbia Court of Appeals on some federal question. The Court of Appeals decision below would be precedent for interpreting the scope of Labor Organization Bonds required by federal statute--which is a federal question. It would not, however, be binding precedent on the local District of Columbia courts in interpreting the scope of a bond with the same language, but which bond is not required by federal law--which is a question of local law.

Conversely, the District of Columbia local courts have never had occasion to address the scope of bonds required by LMRDA. Indeed, it is unlikely, although not impossible, that the local District of Columbia courts would ever have occasion to consider such a question in light of the various statutes granting the federal district courts original jurisdiction over claims made under bonds required by LMRDA § 502 (a).[31]

Thus, there is no decision either of the District of Columbia Court of Appeals or of another federal court of appeals on the question of federal law raised herein. Accordingly, it cannot be said that there is a conflict with the decision of the Court of Appeals for the District of Columbia Circuit to be resolved.

Finally, it should be recognized that the decisions below are extremely fact-dependent. Indeed, the issue of what acts con-

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[29] *Cf. United States v. Zacks*, 375 U.S. 59, 61 (1963).

[30] *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

[31] *See* 28 U.S.C. §§ 1331, 1337, 1352.

stitute "fraud or dishonesty" under a fidelity bond will invariably depend on the specific facts before the Court. No rule of far-reaching application was created. Rather, the Court of Appeals (and the District Court) applied the broad general guidelines considered by other courts to the specific allegations before it. In reality, Petitioners simply disagree with the conclusions reached. This Honorable Court need not and should not superimpose its judgment as to the merits of the particular claims made in this case for the considered decisions below.

For the reasons set forth above, this case presents neither special nor important reasons to grant review on writ of certiorari.

II. No Error By The Court Of Appeals Is Presented

A. The Determination That the Acts in Support of the PATCO Strike Did Not Constitute "Fraud or Dishonesty" Was Decided Under the Appropriate Standards

The Court of Appeals found that the acts by the bonded PATCO officers in support of the 1981 strike did not constitute "fraud or dishonesty" relating to the handling of funds. The legislative history of Section 502(a) of the LMRDA which required the bond in the first instance, the Department of Labor regulations implementing these requirements, and District of Columbia case law interpreting language similar to "fraud or dishonesty" in the context of fidelity bonds all support this conclusion.

When the LMRDA was originally enacted in 1959, Section 502(a) required every officer to be bonded for the "faithful discharge of his duties." Pub. L. No. 86-257, § 502, 73 Stat. 536 (1959). In 1965, partially due to the uncertainty of that phrase and the corresponding higher premium charged by sureties to cover the broader risk, the LMRDA was amended to require a bond to protect against loss by reason of acts of "fraud or dishonesty." Pub. L. 89-216, § 1, 79 Stat. 888, amending 29 U.S.C. § 502(a). In adopting this requirement, Congress was clearly looking to and requiring the coverage afforded by similar extant bonds offered by insurance companies.[32]

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[32] *See* S. Rep. No. 698, 89th Cong., lst Sess. ____, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3248, 3249 (The honesty bond which would be required . . . is

Furthermore, the Department of Labor regulations implementing the bonding requirements of the LMRDA also recognize that Congress had "a clear awareness of trade usages and terminology in this field." 29 C.F.R. § 453.18(a). *See also* 29 C.F.R. § 453.12 (referring to other bonds providing protection against "fraud or dishonesty" for interpretation of that term).

The Department of Labor regulations, implementing the bonding requirements of LMRDA § 502 (a), amplified the meaning of "fraud or dishonesty."

> The term "fraud or dishonesty" shall be deemed to encompass all those risks of loss that might arise through dishonesty or fraudulent acts in handling of funds as delineated in §§ 453.8 and 453.9. As such, *the bond must provide recovery* for loss occasioned by such acts *. . ., provided that within the law of the state in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. As usually applied under state law, the term "fraud or dishonesty" encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss.*

29 C.F.R. § 453.12 (emphasis added). Thus, interpretations under District of Columbia law of the coverage provided by bonds insuring against "fraud or dishonesty" do provide great guidance in establishing the scope of the bond herein.

District of Columbia case law reveals that fidelity bonds insuring against losses incurred "through any fraudulent or dishonest act or acts," are generally recognized to protect against losses

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the same type of bond which has been used by corporations, banks, and other financial institutions and has proven effective and adequate.") (statement of Secretary of Labor Wirtz); H. Rep. No. 182, 89th Sess. 1st Sess. 2 (1965) ("We ought to have a simple honesty bond of the type which is exacted with respect to all banks, various financial trusts, and which has been found effective and adequate on handling of funds in other cases in a businesslike way . . . .") (statement of former Secretary of Labor Goldberg).

resulting from some concealed misappropriation, not simply misuse, involving the insured's assets. *See, e.g., Imperial Ins., Inc. v. Employers' Liab. Assurance Corp.*, 442 F.2d 1197 (D.C. Cir. 1970) (the insured made a claim for losses incurred under insurance policies written, but not disclosed, by its general manager). *See also Fidelity & Deposit Co. of Md. v. President and Directors of Georgetown College*, 483 F. Supp. 1142, 1144 (D.D.C. 1980) (claim that employee illicitly diverted NIH grant funds to private research).

The paradigmatic fidelity bond claim involves an employee who makes off with assets of the employer. *See, e.g., Alexandre of London, Washington, D.C. Corp. v. Indemnity Ins. Co. of N. Am.*, 183 F. Supp. 715 (D.D.C. 1960).

More generally, under District of Columbia law, it has been held that

> "For an act to be 'dishonest' within the meaning of a fidelity suretyship bond, there must exist the element of moral turpitude or want of integrity." . . . [I]n order to show personal dishonesty within the meaning of a fidelity clause, there must be both "a want of integrity and an intentional breach of trust." . . . In other words, there must exist a compelling sense of conscious wrong rather than a mere omission or act amounting to negligence.

Sade v. National Surety Corp., 203 F. Supp. 680, 684 (D.D.C. 1962), *aff'd*, 314 F.2d 286 (D.C. Cir. 1963).

Similarly, in *Imperial Ins., Inc. v. Employers' Liab. Assurance Corp., supra*, it was held that a fidelity policy covers losses sustained "through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others." *Id.*, 442 F.2d at 1202.

Fraud, of course, requires a false representation of material fact, made with knowledge of its falsity, with intent to deceive, and action taken in reliance on the representation. *See, e.g., Higgs v. Higgs*, 472 A.2d 875, 876 (D.C. App. 1984); *Urban Invs., Inc. v. Branham*, 464 A.2d 93, 98 (D.C. App. 1983).

Petitioners' allegations herein simply do not rise to the level of fraud or dishonesty by the officers of PATCO in connection with the handling of funds. Essentially, as the cases cited indicate, the bond is intended to protect against the loss of union assets through acts in the nature of defalcation. *Cf.* 29 C.F.R. § 453.12 (setting forth specific types of acts constituting "fraud or dishonesty": larceny, theft, embezzlement, *etc.)*.

The claimed losses herein are not related to any defalcation by PATCO officers. Petitioners complain primarily of the loss of future negotiating rights and salary as well as the loss of union assets as a result of the PATCO bankruptcy proceeding and claims and judgments therein. The bonding requirement, however, "relates only to duties . . . in connection with . . . handling of funds or other property. . . ." 29 C.F.R. § 453.11. It cannot even be claimed that these claimed damages were incurred in connection with handling of the union assets.

To the extent such vague allegations were made, *i.e.*, spending of funds by PATCO officers in support of the PATCO strike, they do not involve a defalcation, do not involve deceit, and thus cannot be said to constitute fraud or dishonesty in the handling of those funds.

Finally, Petitioners also make claim for the loss of union assets based generally on an alleged breach of fiduciary duty in supporting the PATCO job action. It is manifestly clear, as the lower courts found, that the bond required by Section 502(a) does not cover every breach of fiduciary duty by labor organization officials, as set forth in Section 501(a) of the LMRDA.

Both the House and Senate Reports on the 1965 amendments to the LMRDA explained:

> The question has been raised . . . whether or not the fraud or dishonesty bond would adequately cover the violations of section 501(a) of the act. Solicitor of Labor Charles Donahue . . . presented the well-considered views of the Labor Department favoring the bill and the proposed substitution of bonds. He states that it is and has been the position of the Department that *the bond required by section 502(a) need not cover all*

> *violations of section 501(a)*. This position is expressed in an interpretative bulletin . . . which states in part:
>
> "*The bonding requirement in section 502(a)* relates only to duties of the specified personnel in connection with their handling of funds or other property to which this section refers. It *does not have reference to the special duties imposed upon representatives of labor organizations by virtue of the position of trust which they occupy*, which are dealt with in section 501(a), and for which civil remedies for breach of the duties are provided in section 501(b). *The fact that the bonding requirement is limited to personnel who handle funds or other property indicates the correctness of these conclusions*. They find further support in the differences between sections 501(a) and 502(a) of the act which sufficiently indicate that the scope of the two sections is not coextensive."
>
> *The committee endorses the soundness of that interpretation*.

H. Rep. No. 182, 89th Cong. lst Sess. 4; S. Rep. No. 698, 89th Cong., lst Sess.___, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3248, 3250-51 (emphasis added). *Accord* 29 C.F.R. § 453.11.

While there is language in the legislative history of the 1965 change indicating that the scope of a bond covering "fraudulent or dishonest acts" would not have a "substantial difference" from a bond covering "faithful discharge of duties,[33] that language also makes it clear that bonding companies were concerned with the greater ambiguity inherent in the latter term.[34]

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[33] Petitioners' Petition at 3, n.1.

[34] The language cited by Petitioners, moreover, only represents the individual view of Senator Winston L. Prouty who would have amended Section 502(a) to provide, "in addition to the requirement that [union officials] provide protection against loss by reason of fraud or dishonesty . . . to also provide protection against loss . . . 'by reason of . . . failure to exercise that degree of due diligence normally required of a fiduciary or a trustee in his handling of such funds or property . . . .'" S. Rep. No. 698, 89th Cong. lst Sess., Supplemental Views, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3248, 3255.

The fact is, of course, that mandated broader coverage for any fiduciary breach of duty was considered and rejected. Congress simply did not require it. Further, as found by the District Court, PATCO did have the option of obtaining a "faithful discharge of duties" bond with its potentially broader coverage and chose not to do so.[35]

Thus, whether or not Petitioners have a remedy against the individual defendants for a breach of fiduciary duty, they have no claim under the bond for the alleged breach of such duty. While Petitioners would have the courts rewrite the bond to cover such claims, it would be improper to do so, particularly in light of PATCO's deliberate decision to forego a broader bond for the faithful discharge of duty coverage afforded therein. Rather, the scope of the bond must be limited to that of other fidelity bonds insuring against acts of fraud or dishonesty by officers responsible for the handling of funds, as intended by Congress.

The decision of the Court of Appeals is entirely consistent with the foregoing authorities. It cited the District of Columbia Court of Appeals in noting that terms of an insurance policy are to be construed to reflect "the understanding of the ordinary person, that is to say . . . the meaning that common speech imparts."[36] The meaning accorded to the term "fraud or dishonesty" in the context of a fidelity bond by the Court of Appeals, moreover, is wholly consistent with the guidelines offered by District of Columbia courts in construing fidelity bonds not required by federal statute, as well as with the intent behind the LMRDA manifested by its legislative history and the implementing regulations.

Petitioners attempt to find significant error in the fact that the Court of Appeals cited to "secondary 'hornbook' authorities." They argue that other provisions of District of Columbia law should have been cited instead.

The provisions of D.C. law referred to by Petitioners are completely unrelated to either the ordinary common sense definition or the trade usage meaning of "fraud or dishonesty," as recognized by the courts. In citing to such diverse authorities as the

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[35] A at 18a.
[36] A at 6a.

Uniform Fiduciaries Act of the District of Columbia, the common law tort of conversion, and a District of Columbia code provision related to real estate transactions, Petitioners seek to bootstrap into a definition of "fraud or dishonesty" which Congress and the Department of Labor clearly did not intend in requiring a bond and which the surety could not anticipate in issuing it.

Nevertheless, Petitioners attack the Court of Appeals for referring to insurance law treatises such as *Couch on Insurance* and Appleman, *Insurance Law and Practice*. On numerous occasions, however, the District of Columbia Court of Appeals has itself cited and relied on these well-respected treatises in interpreting insurance policies and, in particular, in construing specific terms appearing in such policies.

For example, in *Western Exterminating Co. v. Hartford Accident & Indem. Co.*, 479 A.2d 872, 875 (D.C. App. 1984), Section 44:286 of *Couch on Insurance* is exclusively cited for determining whether certain events qualified as an "accident," as "that term is used in the general liability insurance policy here . . .."[37] Similarly, in *Streule v. Norfolk & Dedham Mut. Fire Ins. Co.*, 264 A.2d 296, 297 n.2 (D.C. App. 1970), Section 3267 of Appleman, *Insurance Law and Practice,* is the exclusive source cited for a definition of the "term 'perils of the sea' as used in a marine policy."[38]

It is thus hard to comprehend Petitioners' insistence that the Court did not look to the interpretation of "fraud or dishonesty" that would have been made by the local courts. Petitioners' position is particularly ironic in light of their reliance on decisions from other jurisdictions such as Pennsylvania and Illinois.[39]

Petitioners are equally inconsistent in arguing that the Court should make its ruling based on how District of Columbia courts would construe a "fraud or dishonesty" bond, while they seek to

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[37] *See also Young v. Firemen's Ins. Co. of Washington, D.C.*, 463 A.2d 675, 676 (D.C. App. 1983) (Section 28.14 of *Couch on Insurance* is primary source for definition of "legal representative" as that term is used in a fire insurance policy).

[38] *See also S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195, 198 (D.C. App. 1978) (Sections 7381 and 7384 of Appleman, *Insurance Law and Practice*, cited for guidelines in interpreting the phrase "the following offenses . . . false arrest . . . or malicious prosecution" in an insurance policy).

[39] *See* Petitioners' Petition at 13-14, 17-18.

rely on the general language of the provisions of LMRDA as set forth in Sections 401 and 501(a). Ultimately, the general policy statement of Section 401 and certainly the fiduciary obligations established by Section 501(a) are simply unrelated to the specific bonding requirements of Section 502(a), as the legislative history cited above makes explicitly clear.

As set forth under the correct guidelines, discussed above, as well as under the definition adopted by the Court of Appeals, Petitioners' allegations of wrongdoing by the bonded PATCO officers do not qualify as "fraud or dishonesty" within the meaning of the Labor Organization Bond written by Fidelity. It was therefore correct for the District Court to dismiss the claim on the bond and for the Court of Appeals to affirm.

B. It was Not Error to Consider That the Acts Were Open and Notorious and Sanctioned by the PATCO Membership

Petitioners argue that the Court of Appeals sustained the grant of summary judgment in favor of Fidelity "simply because the union officials . . . have *not concealed* acts of intentional and flagrant" fraud or dishonesty . . . ."[40] Little could be further from the truth.

Rather, the Court of Appeals had before it, as does this Honorable Court, the alleged acts of "fraud or dishonesty."[41]

After discussing the definition of "fraud or dishonesty," the Court held:

> The actions of PATCO officials in appropriating funds for the 1981 strike, which was supported by most of the union membership, do not reflect a corrupt intent to deceive or to defraud the membership; nor do they reveal a breach of financial integrity, as would be the case if larceny, theft or embezzlement of PATCO funds was involved. Therefore, the bond does not protect PATCO against the kind of conduct of which appellants complain.[42]

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[40] Petitioners' Petition at i (emphasis in original). *See also id.* at 11-13.

[41] A at 5a-5b, 37a-38a, 40a-41a.

[42] A at 6a-7a.

Quite clearly, the Court of Appeals mentioned the fact that the union strike was supported by the union membership. This fact cannot seriously be viewed, however, as dispositive. Based on all the allegations made, the Court concluded that there was no "corrupt intent" nor a breach of "integrity." These are precisely the standards looked to in the decision in *Sade v. National Surety Corp., supra,* which Petitioners have submitted provides the proper criteria.

To the extent that the membership supported the strike or the fact that the PATCO officers did not conceal their support for the strike was considered in coming to the conclusion that the acts complained of were not "fraud or dishonesty" within the meaning of the bond, it was thus appropriate to do so. For example, the definition of fraud recognized by either the ordinary person and/or District of Columbia case law requires that there be a false representation or intent to deceive, as well as detrimental reliance.

There was no reliance on any misrepresentations. The air traffic controllers were almost certainly aware of the illegality of their action before they struck. Most certainly after President Reagan's announcement on August 3, 1981, they were aware of the consequences. It is hard to understand how Petitioners might claim that any deception or stealth was engaged in by the PATCO officers in connection with their handling of union assets. All the actions and the consequences thereof were apparent when they were made and approved of by a majority of the PATCO membership.

Petitioners are attempting to classify the will of the majority of their voluntary association as "fraud or dishonesty" by the officers. Rather, it should be recognized that, in such an organization, the "majority rules" and Petitioners may not now be heard to complain of the authorized acts of their duly-authorized representatives. *Cf. Pattern Makers' League of N. Am. v. NLRB,* 473 U.S. 95 (1985) (the right to resign during a strike protects the employee whose views come to diverge from those of his union). It simply cannot be concluded that there was "misrepresentation," much less "fraud or dishonesty," to the membership.

Petitioners have attempted to bring a claim under the Labor Organization Bond that is simply miles away, conceptually, from

the protection that Congress intended in requiring a bond insuring against fraud or dishonesty in the handling of union property. As the actions complained of do not constitute such acts, the PATCO bond does not provide coverage, and summary judgment was properly entered and affirmed in favor of Fidelity on that ground.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 5, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief of Respondent in Opposition to Petition For A Writ Of Certiorari this 5th day of December, 1988, by depositing three copies in the United States mail, with first-class postage prepaid, addressed to the following counsel of record:

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